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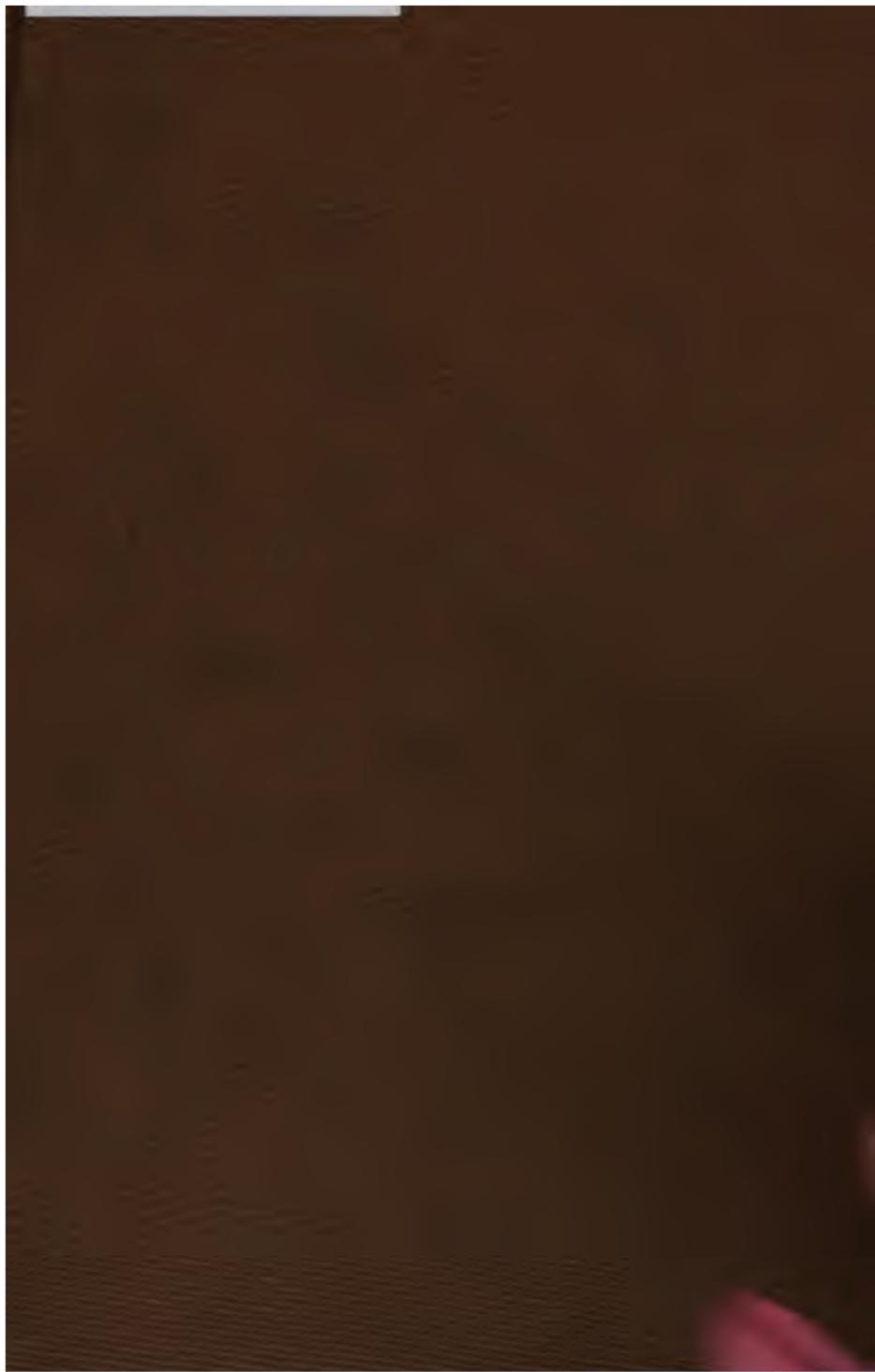
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OF  
THE LAW OF MARINE INSURANCE,  
CONTAINING

A DIGEST OF ALL THE CASES

ADJUDGED IN THIS STATE,

FROM THE EARLIEST REPORTS DOWN TO THE PRESENT TIME

WITH REFERENCES TO

A N A P P E N D I X

OF

CASES DECIDED IN THE SUPREME, CIRCUIT, AND DISTRICT  
COURTS OF THE UNITED STATES,

FROM THE EARLIEST PERIOD DOWN TO THE YEAR 1830.

BY HENRY SHERMAN,

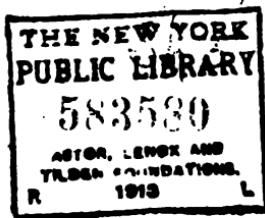
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AN  
ANALYTICAL DIGEST  
OF THE  
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ABANDONMENT.

WHERE the subject insured has been entirely lost by reason of any of the perils against which it is insured ; or has become so much injured as to frustrate the object of the adventure ; or is in itself so damaged as to render it of little or no value ; the insured becomes entitled to call upon the underwriters to accept of what is or may be saved, and to compensate him to the full amount of their subscription. In order, however, to fix his right to claim from them this indemnity he must first *abandon* ; that is, he must cede or relinquish to them whatever right, title, claim or interest he may have in the property insured, or to any such part of it as may chance to be recovered from capture, shipwreck, or any other of the perils comprehended in the policy, which it may have encountered. This provision is said to be as ancient as the contract of insurance itself, although vari-

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ous opinions are entertained by writers on insurance as to the original occasion of its introduction. Yet whatever may be its antiquity or its origin, the object of modern courts in enforcing and protecting it, seems to have had reference more particularly to the encouragement and growth of commerce ; that the insured, by being thus at once reinstated in the capital so hazarded, may be thereby enabled to invest it in some other mercantile adventure. The time within which an abandonment must be made has been but lately fixed in England, and it is now there held, that as soon as the insured receives intelligence of such a loss as will entitle him to do so, he must elect whether he will abandon or not. If he intends to abandon, and does not within a reasonable time give notice thereof to the underwriters, they are at liberty to regard him as having waived the right, and he cannot thereafter recover for a total loss. There is quite a diversity of opinion among elementary writers, and in the adjudged cases, as to what will constitute a valid abandonment. It seems agreed, however, that no particular form is requisite, and that it is not indispensable that it be in writing. But in whatever manner it is made, it is necessary that it be definite and explicit, and not left open as matter of inference from some equivocal acts. *Park on Insurance.* *Marshall on Insurance.* *Jacob's Law Dict.* *Kent's Com.*, vol. 3. *Appendix*, 21, 172, 355. The law as established in this country, relative to the circumstances under which

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an abandonment may be made, when it must be made, how far it is necessary, what is its effect, and what disposition is to be made of the effects abandoned, may be gathered from the following cases : It is usually made

- I. UPON CAPTURE OR ARREST.
- II. UPON A LOSS OF THE VOYAGE.
- III. UPON LOSS OR DETERIORATION OF THE SUBJECT.
- IV. OTHER CAUSES OF ABANDONMENT.
- V. HOW FAR IT IS NECESSARY.
- VI. WHEN AND HOW IT MUST BE MADE.
- VII. WAIVER OF WHAT.
- VIII. ITS EFFECT.
- IX. DISPOSITION OF THE ABANDONED EFFECTS.

#### 1. WHEN MADE UPON CAPTURE OR ARREST.

1. The insured has a right to abandon as soon as he is advised of a capture. *Gardere v. Columbian Ins. Co.*, 7 Johns. Rep. 517. See Appendix, 171, 172, 173, 183.

2. The insured may abandon on receiving information of a capture ; and although it should afterwards appear that the vessel had been restored previous to the time when the abandonment was made, but without the knowledge of the insured, the abandonment will still be considered valid ; and when once rightfully made, it is definitive though the vessel be released and afterward arrives in safety at her port of destination. *Mumford v. Church*, 1 Johns. Cases, 147. *Slocum and Bur-*

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*ling v. United Ins. Co.*, 1 *Johns. Cases*, 151. *Murray v. United Ins. Co.*, 2 *Johns. Cases*, 263. *Livingston v. Hastie*, 3 *Johns. Cases*, 293.

3. But the court of errors have held the contrary. *Church v. Bedient*, 1 *Caines' Cases in Error*, 21. *Hallett v. Peyton*, *Ibid.*, 28. *See Appendix*, 25, 26, 27.

4. Whether the insured shall recover for a total or a partial loss will depend on the circumstances of the case. *Ibid.* *See Appendix*, 23, 24. *Loss*, 9, 10.

5. A capture by a friend, or the carrying a neutral vessel into port for the purpose of adjudication, as contradistinguished from a capture by an enemy, is a good ground for abandonment. *Murray v. The United Ins. Co.*, 2 *Johns. Cases*, 263. *See Appendix*, 24.

6. And such a capture is *prima facie* evidence of a total loss, and the insured may abandon immediately on receiving intelligence of it. *Ibid. Appendix*, 27, 28, 58.

7. In case of capture and re-capture of a vessel, the insured cannot abandon unless the salvage and expenses consequent amount to one half her value. *Parage v. Dale*, 3 *Johns. Cases*, 156. *See Appendix*, 22, 23, 105.

8. If goods insured are captured, carried in, and acquitted, but the insured is not able to obtain them from the captors, he may abandon, and is released from any obligation to have them conveyed to their place of destination. *Bordes v.*

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*Hallett*, 1 *Caines' Rep.* 444. *See Appendix*, 31, 186.

9. Where intelligence of the capture, re-capture, and arrival of the vessel is received at the same time, the insured cannot abandon. *Muir v. The United Ins. Co.*, 1 *Caines' Rep.* 49. *See Appendix*, 22.

10. A vessel bound for a port under the dominion of France was boarded by a British man-of-war, and warned not to proceed. The master put in to Gibraltar, where he was informed of the French and Spanish decrees, and was refused a clearance to any but a British port. *It was held*, that this was not a *restraint of princes* such as would warrant an abandonment, inasmuch as a clearance was not essential; and that a *threat* of British capture did not amount to such a restraint. *Corp v. The United Ins. Co.*, 8 *Johns. Rep.* 277. *See Appendix*, 45.

*See Appendix*, 23, 24, 27, 28, 31, 45, 105, 171, 186.

## 2. WHEN MADE UPON LOSS OF THE VOYAGE.

11. Where, during a voyage, a greater part of the cargo was taken out by pirates, and the vessel was weakened by reason of adverse weather, and the strength and competency of the crew diminished, and the necessaries of life were exhausted—*It was held*, to justify a breaking up of the voyage, and to authorize an abandonment of the cargo. *Gilfert v. Hallett*, 2 *Johns. Cases*, 296.

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12. If the port of destination as described in the policy is blockaded, the insured may abandon. *Schmidt v. The United Ins. Co.*, 1 *Johns. Rep.* 249. *Craig v. The United Ins. Co.*, 6 *Johns. Rep.* 226. See *Saltus v. The United Ins. Co.*, 15 *Johns. Rep.* 523. *Appendix*, 3, 363, 364.

13. If, after the voyage is commenced, the vessel is stopped and detained in consequence of an embargo laid by the government of the United States, whether for a limited or indefinite period, the insured may abandon for a total loss. *M'Bride v. The Marine Ins. Co.*, 5 *Johns. Rep.* 299. *Waldo v. The Phænix Ins. Co.*, 5 *Johns. Rep.* 310. *Ogden v. The New-York Firemen Ins. Co.*, 10 *Johns. Rep.* 177. *In Error*, 12 *Johns. Rep.* 25.

14. In order to render the commencement of a voyage illegal, so as to discharge the insurer, a knowledge that an embargo had been laid must be brought home to the master or owners; a vague rumor or knowledge of the embargo by the pilot, previous to the sailing of the vessel, will not be sufficient to charge the insured with notice that such an act had been passed. *Walden v. The Phænix Ins. Co.*, 5 *Johns. Rep.* 310.

15. The master, on coming within sight of Madeira, the port of destination, saw a ship which he suspected to be a privateer, and went to Cape de Verde Islands, and not being able to repair the vessel there, the voyage was consequently broken up; upon which the insured abandoned. But the vessel afterwards got some repairs and went to

Lisbon ; *It was held*, that, admitting there was no deviation, there was no cause for breaking up the voyage, inasmuch as the vessel might have returned to Madeira, with little or no repairs. *Neilson v. The Columbian Ins. Co.*, 1 *Johns. Rep.* 301. *See Deviation*, 15.

16. Where a vessel was compelled in consequence of a storm to put in for repairs, and her cargo was taken out and the principal part of it was sold in order to prevent its destruction, and the vessel could have been repaired for less than half her value so as to render her competent to the prosecution of the voyage ; *It was held*, that the loss of the voyage did not entitle the insured to recover for a total loss on the policy on the ship. *Goold v. Shaw*, 1 *Johns. Cases*, 293. Affirmed in Error, 2 *Johns. Cases*, 442.

17. It was questioned, by Justice Kent, whether, on a policy on a ship, the insured can abandon while the ship is safe, in consequence of the loss of the cargo, and whether the true rule of law is not that the subject insured must be either actually lost, or so injured as to occasion thereby a loss of the voyage, before it can be abandoned. *Ibid.* *See Appendix*, 33, 34.

18. Where *freight* was insured from Archangel to New-York, and in the course of the voyage the vessel was compelled to put into the Helder for safety ; on a survey she was found to be so much damaged as to be incapable of being repaired unless at an expense far exceeding half her value,

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and although another vessel might have been easily obtained at Amsterdam to carry on the cargo to New-York at a moderate freight ; yet the hemp, of which the cargo chiefly consisted, was so much wet and damaged as to render it hazardous, if not unfit to be re-shipped in another vessel, if any master could have been found who would have been willing to carry it on in that condition. The voyage was consequently broken up ; the vessel and cargo sold at the Helder for the benefit of all concerned, and the insured abandoned for a total loss ; *It was held*, that the insured had a right to abandon, and might recover for a total loss, deducting freight, *pro rata itineris* from *A.* to *H.* *Whitney v. The New-York Firemen Ins. Co.*, 18 *Johns. Rep.* 208. *See Post*, 37, 38, 64, 65. *See Appendix*, 3, 45, 46, 138.

### 3. WHEN MADE UPON LOSS OR DETERIORATION OF THE SUBJECT.

19. Where the goods which are saved do not amount to half the value of the goods insured, the insured may abandon as for a total loss, which cannot afterwards be turned into a partial loss. *Gardiner v. Smith*, 1 *Johns. Cases*, 141. *Center v. The American Ins. Co.*, 7 *Cowen's Rep.* 564. *See Appendix*, 87, 88.

20. And such an abandonment may be enforced, although the ship should thereafter be repaired by the master and proceed on her voyage. *Dickey v. The New-York Ins. Co.*, 4 *Cowen's Rep.* 222.

21. Where a *chariot* was insured (to be carried on deck) among other perils, against jettison, and free from average ; and the box of it, which was estimated at two thirds of the price of the whole, was thrown overboard in a storm ; *It was held*, that the insured might abandon as for a total loss, inasmuch as by the loss of the box the subject no longer remained *in specie*. *Judah v. Randall*, 2 *Caines' Cases in Error*, 324.

22. In case of stranding, the goods must be deteriorated to half their value to justify an abandonment. *Ludlow v. The Columbian Ins. Co.*, 1 *Johns. Rep.* 335. *See Ante*, 19.

23. The vessel, on board of which the goods were laden, stranded at the mouth of a harbor, and not being able to get her off immediately, and upon the advice of other persons there, the master concluded to break up the voyage. Two days thereafter the goods were landed, and ten days from this were sold at public auction. The consignees bought the goods, and the vessel having been got off, proceeded with them to their original port of destination. The goods were sold by the package without being opened ; and though one box appeared to be injured, there was no evidence of the extent of the damage ; *It was held*, that the insured had no right to abandon as for a total loss ; and that in this case he was bound to send the goods to their place of destination, inasmuch as the accident happened at the mouth of the harbor, and lighters might have been obtained to transport them. *Ibid.*

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24. Stranding is not always *per se* a loss which will justify an abandonment. It is a question of evidence whether it is attended with such circumstances as to produce a total loss; either because followed by a shipwreck or other destruction of the property; or because the vessel cannot be set afloat; or because she cannot be repaired at the place of the peril; or cannot be got off at an expense of half her value. *Patrick v. The Commercial Ins. Co.*, 11 *Johns. Rep.* 9.

25. It seems, that if a vessel should be deemed a wreck, or her situation desperate after having stranded, it will justify an abandonment, and the same may be enforced, although she should afterwards be got off by others and repaired for a less sum than was estimated. *Fontaine v. The Phœnix Ins. Co.*, 11 *Johns. Rep.* 293.

26. Where certain articles are enumerated in the policy, and a moiety of them is lost, the insured may abandon as for a total loss, even although the loss is not equal to a moiety of the whole cargo. *Vandenheuval v. The United Ins. Co.*, 1 *Johns. Rep.* 406. See Appendix, 87, 88.

27. An insurance was effected on articles specified in the policy; part were lost by jettison, and part, having been damaged, were sold at a port of necessity, and the balance, being less than a moiety, finally arrived at the port of destination. In deducting the sum produced by the part which were sold from the prime cost of all that part of them which never arrived, the loss was reduced to less

than a moiety of the prime cost of the whole ; *It was held*, nevertheless, that the insured might abandon. *Moses v. The Columbian Ins. Co.*, 6 *Johns. Rep.* 219.

28. If in the course of her voyage the vessel be so much injured as not to be worth repairing, it is a total loss. *Snell v. The United Ins. Co.*, 3 *Johns. Cases*, 34.

29. Though the vessel might be refitted so as to convey a part of the cargo, or a less bulky one ; yet, if she cannot be repaired for less than one half her value, so as to complete her voyage with the original cargo, the insured may abandon. *Abbott v. Browne*, 1 *Caines' Rep.* 292. *Center v. The American Ins. Co.*, 7 *Cowen's Rep.* 564.

30. Where the expense of repairs is equal to half the value of the vessel, or more, the insured may abandon as for a total loss. And the amount is to be taken without deducting one third *new for old*, which rule applies only in cases of *partial loss*. *Depuy v. The United Ins. Co.*, 3 *Johns. Cases*, 182. *See Appendix*, 2, 146.

31. The Court of Errors have said, that to constitute a technical total loss of a ship by damage from the perils insured against, she must be injured to the amount of half her value, or more, after deducting the one third *new for old* allowed the underwriter ; that is, she must be injured to the extent of three fourths of her real value or more. *Smith v. Bell*, 2 *Caines' Cases in Error*, 153. *See also Dickey v. The American Ins. Co.*, 3 *Wendell's Rep.* 658. *Appendix*, 146.

31\*. In determining the right to abandon as for a technical total loss, in reference to the expense of repairs, *it seems*, that the parties are concluded by the sum inserted in the policy as the value of the vessel, and are not allowed to give proof of its real value. *The American Ins. Co. v. Ogden*, 20 *Wendell's Rep.* 287.

*See Appendix*, 102, 103, 263.

#### 4. OTHER CAUSES OF ABANDONMENT.

32. Where an insurance was effected from New-York to Bordeaux, and the policy contained the usual printed clause, "to be free from any loss which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade;" and also the following written clause, "warranted not to abandon if turned away, nor, if captured, until condemned." In prosecuting the voyage, the vessel was captured and carried into England, but was afterwards released and proceeded on her voyage to Bordeaux, where she was seized and detained on account of her having come directly from England, and was ordered to leave the territory of France; *It was held*, that the insured could not abandon and recover for a total loss, but that he was entitled to recover for a partial loss, for expenses and average, which was to be computed from the time of capture until the arrival at Bordeaux, where the risk terminated. *Speyer v. The New-York Ins. Co.*, 3 *Johns. Rep.* 88.

33. An insurance was effected on *freight*. The vessel received a slight injury and her cargo was taken out much deteriorated ; whereupon, but while she was still in safety, the insured abandoned. The abandonment, however, was not specially accepted, and the vessel was repaired at a small expense ; *It was held*, that as the vessel was in safety at the time of the abandonment, it could not be enforced. And that the insured ought to have insisted on carrying the cargo to its place of destination to entitle himself to full freight. That the fact of the insurer having superintended the unloading of the cargo, was not to be regarded as an acceptance of the abandonment on the freight, as that was necessary in order to repair the ship, and he was liable for those repairs. *Griswold v. The New-York Ins. Co.*, 1 Johns. Rep. 205 ; 3 Johns. Rep. 321.

34. If goods are carried to their place of destination, although spoiled so as to be of no value, the owner cannot abandon the goods for the freight, but the master is entitled to his full freight for the transportation of the goods. *Ibid.*

35. The insured cannot abandon *quia timet* in cases where the danger apprehended is remote or contingent. *Craig v. The United Ins. Co.*, 6 Johns. Rep. 226. *Corp v. The Same*, 8 Johns. Rep. 277.

36. Where a vessel proceeds on her intended voyage, and is lost at so early a stage of it that more than half the freight must be lost to the insured, and the shipper receives his goods, it is a technical total loss of the freight, and the insured

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thereon may abandon. *Center v. The American Ins. Co. of New-York*, 7 Cowen's Rep. 564. *In Error*, 4 Wendell's Rep. 45.

37. If, in the course of her voyage, a vessel puts into a port where she is permitted by the policy to stop, and while she is there the place is closely invested with cruisers of the enemy of the country to which she belongs, so that if she should attempt to escape she must inevitably be captured; this is *a restraint of princes and of men-of-war*, within the risks enumerated in the policy, and the insured may break up the voyage, and abandon for a total loss, although there is no direct application of physical force to the subject. And an abandonment made under such circumstances, is not liable to the objection that it was made *quia timet*. *Saltus v. The United Ins. Co.*, 15 Johns. Rep. 523.

38. A law of the country to which a vessel is bound, which subjects vessels arriving there under certain circumstances, to confiscation, is not a just cause for breaking up the voyage, unless it appears, with moral certainty, that the law applied to the case in question, and that if the ship had arrived it would have been enforced against her. *Craig v. The United Ins. Co.*, 6 Johns. Rep. 226. *Saltus v. The Same*, 15 Johns. Rep. 523.

39. Where an insurance was effected on freight from New-York to Bremen, with liberty to touch at Amsterdam, &c., "warranted free from seizure in port." The ship from necessity put into the Texel, where she was detained under the laws of

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the country, and while she was so detained, a violent storm arose ; and for greater safety, and with the advice of the crew, the cables were cut and the ship run ashore, in consequence of which she was so much damaged as not to be worth repairing if she could again be got off, which was considered impracticable. The cargo, after having been discharged, was seized by order of the government and put into the king's stores ; *It was held*, that to entitle the plaintiff to freight, there should have been either a delivery of the cargo at Bremen, or a voluntary acceptance of it at the Texel or Amsterdam, by the consignee or supercargo, or a refusal by him, on any offer made to carry on the goods in another vessel. That if the master, or ship-owners, neglect to forward the goods by another vessel when it is in their power to do so, and in consequence the freight is lost, the insurer is not liable. That it was incumbent on the insured to show that the master was prevented by some other cause than the seizure of the goods, from conveying them to Bremen, as otherwise the omission to carry them on was imputable to the seizure as the apparent and proximate cause. *Bradhurst v. The Columbian Ins. Co.*, 9 Johns. Rep. 17.

40. The same of *goods* on board of the same vessel and for the same voyage. *Schiefflin v. The New-York Ins. Co.*, 9 Johns. Rep. 17.

41. The insured on a ship which sustains injury to an extent exceeding half her value, cannot abandon as for a technical total loss, if he is the

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owner of the freight and cargo ; and if these be liable to such an amount of general average contribution as, when deducted, reduces the estimated expense of repairs below half the value of the vessel, allowing the deduction of *one third new for old*. He is entitled to recover only for a partial loss. *Pezant v. The National Ins. Co.*, 15 *Wendell's Rep.* 453.

42. If the vessel arrives at her port of destination, at which her owners reside, the insured has no right to abandon as for a technical total loss. *Ibid.*

43. It is not necessary that the injury sustained by a vessel from the perils insured against, should, in all cases, exceed one half the value in order to justify an abandonment for a total loss. The inability of the master to procure the necessary funds to make repairs, is a valid cause for an abandonment, though the vessel be in the port of destination, and not in an intermediate port, or a port of necessity. *Bronson*, Justice, dissenting. *The American Ins. Co. v. Ogden*, 15 *Wendell's Rep.* 532.

##### 5. HOW FAR AN ABANDONMENT IS NECESSARY.

44. The insured is not bound to abandon immediately on the occurring of an accident, but he may wait the final event and recover accordingly. *Earl v. Shaw*, 1 *Johns. Cases*, 313. *Roget v. Thurston*, 2 *Johns. Cases*, 243. *Steinback v. The Columbian Ins. Co.*, 2 *Caines' Rep.* 129. *Smith*

v. Steinback, 2 *Caines' Cases in Error*, 158. See *Appendix*, 21, 26.

45. It is sufficient if the loss continues total up to the time when the abandonment is made. *Ibid.* See *Appendix*, 102, 179, 180.

46. An omission to abandon will not deprive the insured of his right to recover the actual loss sustained. *Suydam v. The Marine Ins. Co.*, 2 *Johns. Rep.* 138. See *Appendix*, 179, 180, 182.

47. If the destruction of the subject insured is absolute and entire, an abandonment is not necessary in order to entitle the insured to recover for a total loss. *Gordon v. Bowne*, 2 *Johns. Rep.* 150.

48. If *profits* only are insured, an abandonment is necessary if there has been no insurance on the cargo, and in such a case it must be made early, that the insurer may elect either to pay only his loss, or to pay that and the price of the goods at first cost and charges. Therefore, if the insured lie by, and take his goods and sell them, he cannot afterwards call on the underwriters for any loss on the profits. *Tom v. Smith*, 3 *Caines' Rep.* 245.

49. Where the property insured was captured, and during the pendency of proceedings the captors agreed with the consignees to deliver up the cargo to them on their giving a bond to the amount of the appraised value of the property. The property was appraised at a greater amount than the sum at which the insurance was effected, and was subsequently carried to the port of destination and sold by the consignees at an advance beyond the

amount at which it was appraised, and finally, on an appeal to the last resort, it was condemned; *It was held*, that the insured was not bound to abandon, but was entitled to recover the amount paid on the bond, or so much of it as was covered by the policy, as a partial loss. *Gracie v. The New-York Ins. Co.*, 8 Johns. Rep. 237. *See Appendix*, 171.

50. The *spes recuperandi*, in such case, is not a subject for abandonment, inasmuch as its value cannot be computed by a jury, and as after a condemnation by the highest tribunal, there is no *spes recuperandi* of which a court can take notice. *Ibid.* *See Appendix*, 171, 172.

#### 6. WHEN AND HOW AN ABANDONMENT MUST BE MADE.

51. The insured cannot abandon after the voyage is completed, if he have knowledge of the fact. *Parage v. Dale*, 3 Johns. Cases, 156. *See Post*, 58. *Appendix*, 58, 263, 264.

52. An abandonment must be unconditional, explicit, and on sufficient grounds, and the accident which occasions it must be described with certainty and precision. *Suydam v. The Marine Ins. Co.*, 1 Johns. Rep. 181.

53. And the insured is bound by the cause which he assigns for making the abandonment; if it should prove to be insufficient, he is precluded from availing himself of any subsequent accident without making a new abandonment. *Ibid.* As

for instance, if he abandon on account of sea damage only, he cannot avail himself of the fact that the ship was afterwards encumbered with the expense of repairs. *Dickey v. The New-York Ins. Co.*, 4 *Cowen's Rep.* 222. *See Appendix*, 213.

54. Yet if a wrong or insufficient cause is assigned for the abandonment, although the insured cannot recover for a total loss, he is nevertheless not thereby precluded from recovering for the loss actually sustained. *Suydam v. The Marine Ins. Co.*, 2 *Johns. Rep.* 138.

55. Where an abandonment is made as for a total loss, on account of injury to a ship exceeding one half her value, it may be enforced even although she is afterwards repaired by the master and proceeds on her voyage. And it cannot afterwards be turned into a partial loss. *Dickey v. The New-York Ins. Co.*, 4 *Cowen's Rep.* 222.

56. But the abandonment must have been made before the vessel was fully repaired and enabled to proceed on her voyage. *Ibid. Depau v. The Ocean Ins. Co.*, 5 *Cowen's Rep.* 63.

57. The abandonment is void if she is in fact repaired at the time of making it, notwithstanding the fact was not known to the insured. *Ibid. See Appendix*, 137.

58. It is then the actual state of things at the time when the abandonment is made, and not the state of the party's information, which decides the validity of an abandonment. *Ibid. See 8, 9, ante. Appendix*, 25, 30.

59. An abandonment cannot be made, where a vessel has been injured by the perils of the sea, merely because materials to make *full repairs* cannot be procured at the place where she happens to be. If she is not injured to a moiety of her value, it is the duty of the master to make her seaworthy and to proceed in the voyage ; and the underwriter will be held liable to furnish a complete indemnity for any additional expense subsequently incurred in completing the repairs. *The American Ins. Co. v. Center*, 4 Wendell's Rep. 45.

60. Where a *total* is converted into a *partial* loss, by the master of a vessel, in the exercise of his legitimate duties as the agent of *whom it may concern*, and this is done before an abandonment is made, the fact that the loss is no longer *total* takes away the right to abandon. And the effect is the same where a *total loss* is converted into a *partial loss* by the acts of a stranger. *Dickey v. The American Ins. Co.*, 3 Wendell's Rep. 658.

61. If the abandonment is made while the loss continues *total*, all the intermediate acts of the master are the acts of the underwriters. But if the property is restored before the abandonment is made, the right to abandon is gone, and the master will be considered the agent of the insured. *Ibid.*

62. If repairs are made by the underwriters, or by the master as their agent, and the voyage is not lost, but the vessel thereafter arrives in safety, the insured cannot abandon. *Ibid.*

63. The act of abandonment is valid and complete, so as to fix the technical total loss, without exhibiting at the time of making it the preliminary proofs. *Barker v. The Marine Insurance Co.*, 8 *Johns. Rep.* 307.

64. Where the policy contains the clause "warranted not to abandon, if detained or captured, until six months after notice," &c., the effect of it is only to suspend the right to abandon, and an abandonment made at the expiration of that time, relates back and takes effect from the time of the loss. *Clarkson v. The Phænix Ins. Co.*, 9 *Johns. Rep.* 1.

64<sup>a</sup>. Where a policy contained the like clause, "warranted not to abandon in case of capture or detention, until six months after notice thereof to the insurers," and the vessel was condemned in less than one month after her capture, and the insured thereupon abandoned; *It was held*, that the insured had a right to abandon immediately after the condemnation, inasmuch as the warranty was limited to the case of capture and detention only. *Ogden v. The Columbian Ins. Co.*, 10 *Johns. Rep.* 273. *See Appendix*, 118.

65. Where different kinds of goods are specified and separately valued in the policy, the insured may abandon one sort or article, in case of loss, and retain the rest, in the same manner as if the different articles had been insured by different policies. *Diedricks v. The Commercial Ins. Co.*, 10 *Johns. Rep.* 234.

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66. Where a ship was bound to Antwerp, and repairs were made at Port Louis, in the Isle of France, on account of sea damage; and the expense of part of the repairs was defrayed by a sale of the cargo, and the residue was charged on the remainder of the cargo by a respondentia bond; *It was held*, that no lien was thereby created on the ship which could be taken into the account in estimating the insured's right to abandon for a total loss. *Dickey v. The New-York Ins. Co.*, 4 *Cowen's Rep.* 222.

66\*. Under ordinary circumstances, a vessel cannot be abandoned as for a constructive or technical total loss, on the ground of the inability of the master to obtain funds to make the necessary repairs, where the owner is chargeable with the want of ordinary prudence in furnishing funds or credit, and especially where he has deprived the master of the means ordinarily possessed by him of obtaining funds or credit. *The American Ins. Co. v. Ogden*, 20 *Wendell's Rep.* 287. *See Appendix*, 21, 26, 49, 52, 53, 58, 147, 263, 264.

#### 7. WHAT AMOUNTS TO A WAIVER OF AN ABANDONMENT.

67. If after an abandonment of a vessel, the insured purchases her for his own account and benefit, it is a waiver of the abandonment, and he is entitled to recover only for a partial loss. *Abbott v. Sebor*, 3 *Johns. Cases*, 39. *Saidler and Craig v. Church*, cited in the same case as decided in July Term, 1799.

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67\*. And this is the case, although the insured gives notice to the underwriter of the time and place of the sale. *Ogden v. The Fire Ins. Co.*, 10 Johns. Rep. 177. *In Error*, 12 Johns. Rep. 25.

68. But if the property abandoned arrives in safety and is tendered to the insurer, and he refuses to accept it, and a sale of it is made by the insured for the benefit of the insurer, it is not a waiver of the abandonment. *Lixington v. Hastie*, 3 Johns. Cases, 293.

69. A vessel put into a port in distress and was there condemned as not worth repairing, and sold under the order of a court of admiralty for the benefit of all concerned, and was purchased by the supercargo on account of the insured, but before notice of the purchase the insured had abandoned. The underwriter refused to accept the abandonment. The vessel was subsequently brought to her port of destination and sold at auction to a stranger, but without any offer having been made to deliver her to the underwriter, or his having been consulted as to the propriety of the sale. *It was held*, that this was not a waiver of the abandonment, inasmuch as that the insured had not appropriated the vessel to his own use, or attempted to receive any benefit from the purchase. *Abbott v. Bowne*, 1 Caines' Rep. 292.

70. If after an abandonment to the insurers on freight and vessel respectively, the insured compromises with the insurer on the vessel, and receives part of the amount of the loss, and becomes

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substituted in all the insurers rights to the property ; it is not a waiver of the abandonment on the freight. *Davy v. Hallett*, 3 *Caines' Rep.* 16.

71. After an abandonment which is not accepted by the insurer ; the insured remains the *quasi* agent of the insurer, and must do what he thinks most for the interest of the concerned. And if he acts in good faith, and sells the vessel or property insured at public auction in the usual manner, and without a view to his own benefit ; this is no waiver of the abandonment, nor will it prejudice his claim against the insurers for a total loss. *Walden v. The Phenix Ins. Co.*, 5 *Johns. Rep.* 310.

72. If, after an abandonment has been made, the vessel is purchased by the captain or supercargo, in behalf of the owners, and such purchase is affirmed by the insured, it is a waiver of the abandonment, and he is entitled to recover no more than an average loss. *Abbot v. Sebor*, 3 *Johns. Cases*, 39. *See Appendix*, 182, 349, 350.

#### 8. THE EFFECT OF AN ABANDONMENT.

The law gives to the act of abandonment to underwriters, when it is accepted, all the effects which the most accurately drawn assignment would accomplish. The underwriter then stands in the place of the insured, and becomes legally entitled to all that may be recovered from destruction. *See Appendix*, 5, 341.

73. During the interim, which intervenes between the time of the loss which gives the right

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to abandon, and the time when the insured elects to abandon, he is bound to act with good faith, and to take all proper measures to recover and preserve the property insured. If he is guilty of any fraud or misconduct, the loss resulting from it is his own, and the underwriters are discharged. *Roget v. Thurston*, 2 *Johns. Cases*, 248.

74. In case of *capture*, if the insured abandons and receives the amount of the loss, and after condemnation the property is purchased by him or his agent, the purchase will enure to the benefit of the insurer, if such is his election ; and if the property thus purchased is vested in other articles by the agent of the insured, which are by him transmitted to his principal who sells them, *trover will lie by the insurer*, inasmuch as by his affirmance of the acts of the agent, the underwriter obtains an absolute property in the goods, and the subsequent sale by the insured amounts to a conversion. *The United Ins. Co. v. Robinson*, 2 *Caines' Rep.* 280. Affirmed in Error. 1 *Johns. Rep.* 592. See *Appendix*, 184.

75. The acceptance of an abandonment relates back to the period when the accident occasioning it happened, and the insurers become the owners of the property from that period. *The United Ins. Co. v. Scott*, 1 *Johns. Rep.* 106. *Appendix*, 198.

76. Accepting an abandonment and appointing a common agent, by underwriters on the same policy, will not have the effect to constitute them partners. *Ibid.*

77. A vessel insured was captured and condemned, and an offer was made to abandon, which the insurers refused to accept. After condemnation the master made a compromise with the captors, and received back the vessel; *It was held*, that the total loss having been fixed by the abandonment, it was not in the power of the master by any act of his to change the total into a partial loss, without the subsequent assent of the insured; and that the purchase of the vessel by the master, was for the benefit of the insurers, if they chose to take it, but even if they did not, still their refusal to do so could not affect the abandonment. *Jumel v. The Marine Ins. Co.*, 7 Johns. *Rep.* 412.

78. It was also *held*, that besides the total loss, the insured were entitled to recover for all the expenses incurred in endeavoring to recover the property, prior to the composition between the master and the captors; which expenses were to be apportioned as general average upon the vessel, freight, and cargo; but that the insured on the vessel could recover only the proportion chargeable to the vessel. *Ibid.*

79. But the master having raised money, by bottomry, for the repurchase of the vessel which the insurers had refused to accept; they were held not to be answerable for the marine interest secured to be paid by the bottomry bond, nor for any charges, or loss, consequent to the purchase. *Ibid.*

80. To render the insurers liable for marine in-

terest, it must evidently and clearly appear that there were no other means of raising money than by a bottomry bond. *Reade v. The Commercial Ins. Co.*, 3 *Johns. Rep.* 352. *Jumel v. The Marine Ins. Co.*, 7 *Johns. Rep.* 412.

81. By an abandonment the master becomes the agent of the insurers, and the insured are not bound by his subsequent acts unless they have adopted them. *Jumel v. The Marine Ins. Co.*, 7 *Johns. Rep.* 412. *Catlett & Keith v. The Pacific Ins. Co. of New-York*, 1 *Wendell's Rep.* 561. *Dickey v. The American Ins. Co.*, 3 *Wendell's Rep.* 658.

82. The master becoming by the abandonment the agent of the underwriters, is answerable to them alone for his misconduct or loss. *Gardiere v. The Columbia Ins. Co.*, 7 *Johns. Rep.* 514.

83. If a vessel, after an abandonment, is taken and sold under a bottomry bond, the insurer will be liable only for the difference between her value at the time of the abandonment, and the sum at which she is valued in the policy. *Williams v. Smith*, 2 *Caines' Rep.* 13.

84. The plaintiffs were insurers on the cargo and freight of a vessel, and the defendants were insurers on the vessel. After capture, abandonment, and restoration of the ship and cargo, the nett proceeds of the cargo were applied, by the master and consignees, to defray the expenses of the necessary repairs of the ship, and also for arming her; *It was held*, that the insurers on the

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ship (the defendants) were liable for a proportion of the nett proceeds of the cargo, applied to discharge the expenses necessarily incurred in repairing the ship, but not for arming or increasing her complement of men ; and that the sum they were to pay must bear the same proportion to the whole sum so applied, as the sum so subscribed by them to the policy, bore to the whole amount underwritten on the ship. *The United Ins. Co. v. Scott*, 1 *Johns. Rep.* 106.

85. The interdiction of commerce by means of a blockade, is a peril within the policy, and the master is not bound to proceed to the nearest port to deliver the cargo, nor is the affreighter bound to receive the goods there. Yet, if after an abandonment the vessel goes on to another port, for the purpose of delivering her cargo, it will be considered as having been done for the benefit of the insurer. *Schmidt v. The United Ins. Co.*, 1 *Johns. Rep.* 249.

86. The acceptance of the cargo at another than the port of destination, by the consignee, under such circumstances, is an act done for the benefit of all concerned, and will not have the effect to prevent the insured from recovering for a total loss on the abandonment. *Ibid.*

87. Where the vessel and freight are separately insured, an abandonment of the vessel to the insurer on the vessel, does not deprive the insured of his remedy upon the policy on the freight. *Davy v. Hallett*, 3 *Caines' Rep.* 16. *Livingston*

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v. *The Columbian Ins. Co.*, 3 Johns. Rep. 49.  
*Center v. The American Ins. Co. of New-York*,  
7 Cowen's Rep. 564.

88. It is the better opinion, that the abandonment of the ship deprives the insurer on freight of his salvage, or the hope of any indemnity. Per Kent, Ch. Justice, *Livingston v. The Columbian Ins. Co.*, 3 Johns. Rep. 49.

89. Where the cargo and profits are separately insured, an abandonment of the cargo to the insurer on the cargo, does not preclude the insured from recovering for a total loss upon the policy on the profits. *Mumford v. Hallett*, 1 Johns. Rep. 433.

90. Where a ship is detained by an embargo, and the insured abandons, and the insurer accepts the abandonment, *it seems* that the latter will be entitled to the subsequent freight; and that the subsequent wages of the crew will be chargeable to him *as owner*, but not as insurer. *M'Brade v. The Marine Ins. Co.*, 7 Johns. Rep. 431.

91. But if the abandonment is not accepted, the insurer can be liable only for a total loss, together with the necessary expense incurred in laboring for the safety and recovery of the subject of the insurance, in which may also be included the expenses of *wharfage* and of *selling* the ship. *Ibid.*

92. An abandonment of a vessel lost at sea by capture, when rightfully made, transfers as well the *spes recuperandi*, as the interest of the insured in the vessel, although the loss has not actually

been paid by the insurer. *Rogers v. Hosack's Executors*, 18 *Wendell's Rep.* 319. *Same Case*, 6 *Paige's Rep.* 415.

93. Where an insurance is effected on freight, and the vessel meets with an injury during the voyage, the insured cannot recover from the insurer, unless he has entitled himself to receive freight from the shipper, by offering to carry on the goods. *Herbert v. Hallett*, 3 *Johns. Cases*, 93. *Griswold v. The New-York Ins. Co.*, 1 *Johns Rep.* 205. *Griswolds v. The New-York Ins. Co.*, 3 *Johns. Rep.* 321. *Bradhurst v. The Columbian Ins. Co.*, 9 *Johns. Rep.* 17.

94. In case of a valued policy on freight, it is sufficient if there is an inchoate right to freight, at the time the abandonment is made. The insured is entitled to recover the whole amount of the valuation, which must be adhered to if the case be fair and honest between the parties, notwithstanding events in the course of the voyage may render the loss even advantageous to the insured. To sustain an inquiry into the value of the freight would be doing away the effect of the valued policy. *Davy v. Hallett*, 3 *Caines' Rep.* 16.

95. If the insured abandons to the insurer on vessel and freight respectively, he will be entitled to recover from the latter the loss on the freight, deducting *pro rata* if any freight has been previously earned. *Ibid.*

96. In case of a total loss on a policy on freight, the insured is entitled to recover the gross amount of freight, without any deductions for expenses

which the vessel would necessarily have been put to in case of her safe arrival. *Stevens v. The Columbian Ins. Co.*, 3 *Caines' Rep.* 43.

97. The effect of an abandonment is merely to *substitute* the insurer in the place of the insured. And consequently after an abandonment is made and accepted, the insurers are entitled to whatever freight may be thereafter earned. *The United Ins. Co. v. Lenox*, 1 *Johns. Cases*, 377. *Affirmed in Error*, 2 *Johns. Cases*, 443.

98. The freight, prior to the abandonment, goes to the ship-owner, or to his representative, the insurer on freight. *The Marine Ins. Co. v. The United Ins. Co.*, 9 *Johns. Rep.* 186.

99. An insurer on the cargo has nothing to do with the freight, and the accepting the nett proceeds of the cargo by him, after an abandonment, forms no ground for a claim against him for the freight. *The Marine Ins. Co. v. The United Ins. Co.*, 9 *Johns. Rep.* 186.

100. Where a vessel is compelled by disasters to put into an intermediate port, and the voyage is necessarily broken up, and the owner of the goods receives them there, a *pro rata* freight is earned, and the insured on freight is entitled to recover only such a proportion of the amount subscribed by the underwriter as will be equal to the amount of freight to be derived from the proportion of the voyage which remained to be performed. *Williams v. Smith*, 2 *Caines' Rep.* 13.

101. If the master is also owner of the cargo,

and takes upon himself the disposal of the goods, he will be considered as acting in his capacity of owner, and as having earned freight for that proportion of the voyage. He cannot therefore call upon the insurer on freight to indemnify him for such proportion of the voyage as may have been performed. *Ibid.* See *Ante*, 61, 64. *Appendix*, 5, 25, 50, 51, 181.

#### 9. DISPOSITION OF THE EFFECTS ABANDONED.

102. After an abandonment the consignee of the goods becomes the agent of the insurer, and the disposition of the goods saved, as made by him while he acts in good faith, is for the benefit as well as at the risk of the insurer. *Gardiner v. Smith*; 1 *Johns. Cases*, 141.

103. The insured is entitled to recover from the underwriter the expenses of labor and travel, encountered for the protection and recovery of the property insured, over and above the sum insured. And where such expenses are incurred for the recovery of the ship, the whole amount may be recovered from the insurer on the ship, although the freight and cargo may have been incidentally benefitted and ought to contribute in proportion. The insurer on the ship may recover if he can, their contributary shares from the owners or insurers of the freight and cargo. *Watson v. The Marine Ins. Co.*, 7 *Johns. Rep.* 57. See *Ibid*, 412. *Bridge v. The Niagara Ins. Co.*, 1 *Hall's Superior Court Rep.* 423.

104. Where a vessel was captured and condemned ; *It was held*, that the insured was entitled to recover, beside the amount of the total loss, the expenses incurred by the captain in endeavoring to procure the release of the ship, which included his wages from the time he left her, until his arrival home, together with his passage money, commissions, and interest ; but that the insurers on the ship were not liable for any expenses incurred specifically and exclusively for the benefit of the cargo, nor for any *per diem* sum agreed by the owner to be allowed to the captain while in port. *Ibid.*

105. Where, after capture and abandonment, the insured appointed an agent to manage the property, and the agent compromised with the captors ; *It was held*, that the insurer was still liable for a total loss, without any deduction being made for what had been recovered, so long as it remained in the hands of the agent or other third person, to whom the insurer must look. The court said, that the composition made by the agent, appointed by the master of the vessel, and part owner of the cargo, was done in good faith. It was made for the benefit of the insurer, to whom the person entrusted with the management of the business must be considered the agent. It was a discretion within the scope of his authority. A discretion which, if fraudulently exercised, would often be for the benefit of the underwriters, but which would never be used if at the hazard of turning a total into a

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partial loss. Had the balance, after payment of the composition money and charges, been received by the master himself, it might have been a proper case for deduction. But the money is still in the hands of the foreign agent. He may fail, and the insured ought not to run that risk. It is to the person in whose hands the money is that the insurer must look. *Miller v. De Peyster*, 2 *Caines' Rep.* 301. See *Abbott v. Broome*, 1 *Caines' Rep.* 303, note a.

106. Under a provision in the policy, giving the insured permission *to labor, &c.*, the insurer is liable for expenses incurred in attempting to recover the property, *in addition* to the total loss. *Jumel v. The Marine Ins. Co.*, 7 *Johns. Rep.* 412. *Watson v. The Marine Ins. Co.*, 7 *Johns. Rep.* 57. *Lawrence et al. v. Van Horne et al.*, 1 *Caines' Rep.* 276.

107. Where a policy contained a warranty of neutral property, and also a clause making it "lawful and *necessary* for the insured, his factors, &c., to sue for, labor, and travel in and about the defence, safeguard, and recovery of the property, &c.;" *It was held*, that in case of capture, the insured or their agents were not bound to put in a claim or appeal. And although the property was condemned because no claim was interposed, yet the insured were entitled to recover, inasmuch as that the insured has a right to abandon immediately on advice of a capture. And after an abandonment is rightfully made, the master becomes the

agent or servant of the insurers, and is answerable to them for his misconduct or neglect. *Gardiere v. The Columbian Ins. Co.*, 7 Johns. Rep. 514. *See Bordes v. Hallett*, 1 Caines' Rep. 444.

*See Appendix*, 184.

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### ADJUSTMENT.

By the contract of insurance the underwriter agrees to indemnify the insured against any loss which he may sustain from the happening of any of the events which are expressly named, or by implication of law contained in the policy. When therefore, a loss has been incurred from any of the perils insured against, it first becomes necessary to ascertain how far the underwriters are liable, and to what amount the insured is to be indemnified, after all proper deductions and allowances are made ; as well as to fix the proportion which each of the underwriters on the policy is bound to pay. This is a matter oftentimes attended with much difficulty. Ordinarily the task rests with the insurer who first subscribes the policy. But in more complicated cases, the practice has been to refer the papers to some disinterested party, conversant with the business, to examine into the facts and circumstances, and to calculate the per centage rate of loss. It is sometimes found necessary,

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however, to resort to courts of law, in order to decide questions of doubt and difficulty which defy the skill and intelligence of the most experienced merchants. When the exact amount of damage which may have been sustained from the peril encountered, has been ascertained, and it is settled to what extent the insured is to be indemnified, and what each underwriter is bound to pay, the insurer endorses on the policy, *adjusted this loss at so much per cent.*, or some words to the same effect. This is called an ADJUSTMENT. After it has been made it is not usual for the underwriter to require any further proof of loss, but to pay the amount at once. Yet if he refuses to do so, the insured is not required to go into proof of his loss, or of any of the circumstances. The adjustment is considered in the nature of a note of hand, on which the insured is entitled to recover, unless the underwriter shows facts which shall have the effect to relieve him from his liability. *Park on Insurance, Chap. vi. Marshall on Insurance, Book I. Chap xv.* Our own courts have held, that

1. An adjustment signed by the insurer, does not conclude him, if he can show that it was made on the misrepresentation of the insured ; and whether such misrepresentation was the result of design or mistake is immaterial. *Tangier v. Hallett, 2 Johns. Rep. 233. See post, 5, Evidence, 7.*

1<sup>o</sup>. The rule for adjustment, in cases of general average, is to estimate the goods lost as well as those saved, at the price they would have brought

at the port of discharge, on the ship's arrival there, freight being deducted. *Strong v. The Firemen's Ins. Co.*, 11 *Johns. Rep.* 323. *See post*, 13.

2. An adjustment made in a foreign country, according to the laws of that country, is not conclusive upon parties who have entered into the contract here. They are to be considered as having in view the law of this state, and must be governed by it. *Lenox v. The United Ins. Co.*, 3 *Johns. Cases*, 178.

3. Yet, where a general average has been fairly settled in a foreign port, and the insured obliged to pay his proportion of it, he may recover of the insurer the amount so paid by him; notwithstanding such average may have been settled differently abroad, from what it would have been at the home port. *Strong v. The Firemen's Ins. Co.*, 11 *Johns. Rep.* 323. *Depau v. The Ocean Ins. Co.*, 5 *Cowen's Rep.* 63.

4. Where all the facts in the case have been disclosed, an adjustment is conclusive. And it cannot be opened except on the ground either of fraud or mistake from facts not known. *Dow v. Smith*, 1 *Caines' Rep.* 32.

5. An adjustment made by the agent of the insurer does not bind him so conclusively that he will not be permitted to show the same to be erroneous. *Bordes v. Hallett*, 1 *Caines' Rep.* 444. *See ante*, 1.

6. In adjusting a loss, where the goods are valued at so much per pound in the policy, their

weight must be calculated according to the standard of the place where the contract was made. *Gracie v. Bowne*, 2 *Caines' Rep.* 30. *See Appendix*, 265.

7. If there has been no fraud or imposition practiced, the valuation in the policy is conclusive against the insurers. *Kane v. The Commercial Ins. Co.*, 8 *Johns. Rep.* 229. *See Appendix*, 267.

8. The premium also may be resorted to as a guide in discovering the amount intended to be insured. *Post and others v. The Phenix Ins. Co.*, 10 *Johns. Rep.* 79.

9. It is a settled general rule, that in an open policy upon cargo *the invoice price of the goods* is the value which, upon a total loss, the insured is entitled to recover. It has been adopted as affording not only an equitable but a certain rule, not influenced by the fluctuations of value which subsequent circumstances may produce. *Gahn v. Broome*, 1 *Johns. Cases*, 120. *See post*, 11. *Appendix*, 189, 231.

10. And that without allowing any deduction for the drawback allowed on exportation. The drawback is intended for the benefit of the merchant on the exportation of certain goods, and not for the advantage of the insurer. *Ibid. Minturn v. The Columbian Ins. Co.*, 10 *Johns. Rep.* 75.

11. The terms *invoice price of the goods*, mean the prime cost. *Le Roy v. The United Ins. Co.*, 7 *Johns. Rep.* 343.

12. *It seems* that in estimating a total loss, on an open policy of insurance, the value of the goods

at the outset or commencement of the risk, with the usual charges, is what the insurer ought to pay. And that the prime cost is generally the safest and best way of ascertaining such value, especially where the goods are purchased for exportation. *Ibid.* *See post*, 16, 19.

13. The true rule by which to calculate, in adjusting a partial loss on goods, arising from sea-damage, is to take the difference between the gross proceeds of the sound and damaged goods at the port of delivery. That is a proportion of the *prime cost* of the damaged goods, corresponding to the proportion of the diminution of the *gross proceeds* thereof. The fluctuation of the market, freight, or duties, and port charges, not to be included. *Lawrence v. The New-York Ins. Co.*, 3 *Johns. Cases*, 217. *See ante*, 1<sup>o</sup>.

14. A total and an average loss are not both recoverable under the same policy. *Schmidt v. The United Ins. Co.*, 1 *Johns. Rep.* 312.

15. In making up an account of loss, on an open policy, the insurer cannot charge commissions on the purchase of goods by himself. *Anonymous*, 1 *Johns. Rep.* 312.

16. In calculating a loss, on an open policy, the premium of insurance is to be added. *Ogden v. The Columbian Ins. Co.*, 10 *Johns. Rep.* 273.

17. Where the insurer refuses to accept the abandonment, in case of a total loss, and the insured sells the property, the money produced on the sale must be deducted from the amount for

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which the insurer is liable. *Church v. Bedient, and Hallett v. Peyton*, 1 *Caines' Cases in Error*, 21, 28.

18. A vessel was insured from New-York to Bordeaux, and was consigned with part of her cargo belonging to the owner, to a person at B., on whom the owner had drawn bills to the full amount of the goods and freight. The master applied to the consignee for money to make repairs which were necessary to enable the vessel to return to New-York. The consignee advanced the money and took a bottomry bond for the amount; *It was held*, that inasmuch as it did not appear that there were no other means of raising the money, the insurers were not bound to pay the bottomry bond, but were liable only for the repairs. *Reade v. The Commercial Ins. Co.*, 3 *Johns. Rep.* 352.

19. In ascertaining her value, in an open policy on a vessel, charges are to be allowed only for such articles as add to her permanent value, or are necessary to prepare her for the voyage insured, such as provisions, &c., together with a month's pay advanced to the captain and crew. *Kemble v. Bowne*, 1 *Caines' Rep.* 75.

20. The two *per cent.* deducted in case of loss, is regarded as part of the consideration for the insurance, or as so much additional premium in case of disaster, and therefore not to be added to the valuation. *Ibid.*

21. In adjusting the amount of loss in case of repairs, the insurer is entitled to a deduction of

one third *new for old* from the expense of the repairs. Or, in other words, he is bound to pay but *two thirds* of the expense. And this rule is adopted without regard to the distinction which prevails in *England*, between a new and an old vessel. There, if the injury is sustained, and the repairs are made while the vessel is new, that is, on her first voyage, no deduction is allowed to the underwriters; because, the vessel *being new*, it is not to be supposed that she is put in a better condition by the repairs. But in this state that distinction has not been adopted, and the deduction is made alike, whether the vessel is *new* or *old*. *Dunham v. The Commercial Ins. Co.*, 11 *Johns. Rep.* 315. *Byrnes v. The National Ins. Co.*, 1 *Cowen's Rep.* 265. *See ABANDONMENT*, 31.

22. Thus, where an *old copper sheathing* was partly taken off and replaced by *new sheathing of copper*; *It was held*, that in adjusting the loss, the value of the old copper must first be deducted from the value of the new; and then to deduct from the balance one third *new for old*, and the remainder would be the measure of damages. *Per Savage, Ch. Justice. Byrnes v. The National Ins. Co.*, 1 *Cowen's Rep.* 265. *Dickey v. The New-York Ins. Co.*, 4 *Cowen's Rep.* 222. *Dickey v. The American Ins. Co.*, 3 *Wendell's Rep.* 658.

23. This is usually called an injury to *more than half her value*. *Ibid.*

24. The meaning of these words, "one half of her value," when applied to the vessel, is the half

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of the general market value at the time of the disaster, and not her value for any particular voyage or purpose. *Center v. The American Ins. Co. of New-York*, 7 *Cowen's Rep.* 564. In error, 4 *Wendell's Rep.* 45. *See Appendix*, 146.

25. And in estimating whether a vessel can be repaired for one half her value, the calculation is not to be made according to the valuation in the policy, but according to her value at the place where the injury may occur. *Fontaine v. The Phœnix Ins. Co.*, 11 *Johns. Rep.* 293. *Center v. The American Ins. Co. of New-York*, 7 *Cowen's Rep.* 564. Same case in Error, 4 *Wendell's Rep.* 45.

26. And such sum is to be taken into the consideration, as it will cost to place her *in statu quo*; in general with the same kind of materials of which she has been deprived by the disaster. Thus, if she was *sheathed with copper*, and her sheathing is injured or destroyed by the disaster, the expense of repairing or re-sheathing with the same kind of materials must be taken into the account, even although a sheathing of wood might render her competent to perform the voyage. *Ibid.*

28. *To repair* means to *amend*, or *restore*, or *fully reinstate* the vessel. And if she is repaired only in part at the port of necessity, and yet sufficiently so to render her seaworthy, and thereafter pursues her voyage, in estimating the expense of repairs, &c., to the amount of repairs made at the port of necessity, must be added the expense for

additional repairs at the place where she would most probably be repaired in full. *Ibid.* 4 *Wendell's Rep.* 45. *See Appendix*, 151, 220.

29. All losses and expenses necessarily, prudently, or reasonably incurred on account of the property saved from shipwreck, from the time of the wreck to the time when it is in a situation to be directly transported to the place of its ultimate destination, are proper charges upon the property so transported, and for which the underwriters are liable. *Bridge v. The Niagara Ins. Co.*, 1 *Hall's Superior Court Rep.* 423.

30. Sums paid for transporting the master and crew, and for their support, board, and lodging and passages during the same period, are proper charges upon the property, and are also to be borne by the insurers. And if by the wreck they have been separated from the vessel, they are entitled to compensation as *laborers or salvors*, for their services in transporting and saving the property, which is to be allowed according to the nature of the services rendered. *Ibid.*

31. Where *dollars* were taken by the master and crew from a stranded vessel, and were carried on shore and buried in the sand, and thereafter, and before they could be reclaimed, were stolen; *It was held*, that they were not landed in *good safety*, and that the underwriters were liable for the loss. But that the expenses incurred by the master in going after the dollars buried, must be apportioned on the dollars alone. *Ibid.*

32. When the adjustment of a loss is by stipulation submitted to referees, they are to be satisfied as to the nature of the charges, and the payment thereof, in such manner as they may reasonably think fit, and in case any difficulty arises, application must be made to the court for its direction. *Ibid.*

33. Where the underwriter is liable for expenses which have been paid by the insured, beyond the amount of the total loss, the insured will be allowed interest from the time of making the advance. *Vandenheuvel v. The United Ins. Co.*, 1 Johns. Rep. 406.

34. It rests in the discretion of the jury to allow interest on the amount of a partial loss, if under all the circumstances they think it proper. *Anonymous*, 1 Johns. Rep. 315.

35. A partial loss, which arises from a compulsory sale of the cargo in a foreign port, is to be estimated by deducting the nett proceeds of the sale from the invoice price or cost of the goods. *Suydam v. The Marine Ins. Co.*, 2 Johns. Rep. 138.

36. The three subjects of insurance, vessel, cargo and freight, are subject to the rule, as to a technical total loss, which requires a deterioration to more than one half their value. *Center v. The American Ins. Co. of New-York*, 7 Cowen's Rep. 564. Same case in error, 4 Wendell's Rep. 45.

*See Loss*, 22. *See Appendix*, 69, 70, 248.

**ADMIRALTY, COURTS OF.**

COURTS of Admiralty have jurisdiction over policies of insurance as maritime contracts, but not over contracts leading to policies. They cannot reform a policy by the antecedent contract ; this matter properly belongs to a Court of Equity. *See Appendix*, 143, 206.

As to proceedings of foreign Courts of Admiralty, *See EVIDENCE*, 3, 4, 5, 6, 17. *APPENDIX*, 278, 280, 281, 283, 296, 304, 305, 306, 310, 313, 314, 322.

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**AGENT.—*See BROKER.***

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**AVERAGE.**

THIS term is so variously applied in policies, and among writers on insurance, that it is very difficult to get at the precise and correct meaning of the word. It is used as well in application to a contribution for a *general loss*, as for a *partial loss*. In the former application of it, however, it is usually denominated *general or gross average*, and in the latter, *average loss*. Wherever goods or merchandise carried by sea, are thrown overboard in a

storm, for the purpose of lightening the ship, the owners of the ship, and of the goods which may chance thereby to be saved, contribute for the relief of those whose goods have been thrown over, in such a manner that all those who were benefitted by the lightening of the vessel, may bear a proportion of the loss sustained by the owners of the goods which have been thrown overboard for the common safety. This contribution is what is meant by *general or gross average*. And it is so called because it falls generally on the whole or gross amount of the ship, freight, and cargo, as well as to distinguish it from what is often, though improperly, called *particular average*, but which really means a particular or partial loss, and not a general loss, and has no affinity to *average* properly so called. It embraces all those acts which the master of a ship in distress, with the advice of his officers and crew, deliberately resolves upon for the preservation of the whole ; such as cutting away masts or cables, or throwing goods overboard, in order to relieve the vessel. The liability to contribution falls proportionally upon all who are concerned in either the ship, freight, or cargo, according as the common welfare has been promoted by the sacrifice made. And the insurers are liable to make good the loss sustained by such contribution, in proportion as they have respectively underwritten.

*Partial or average loss*, when applied to the ship, means such damage as she may have sus-

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tained in the course of her voyage, from some of the perils named in the policy. When applied to the cargo, it means such damage as the goods may have suffered from storms, &c., though the whole or a greater part of them may arrive in port. Besides this, there is also

*Petty average*, which consists of such charges and disbursements as the master of a vessel, according to occurrences and the custom of every place, necessarily furnishes for the benefit of the ship and cargo, whether at the place of loading or unloading, or in the course of the voyage. It seems, however, that these charges do not fall upon the insurers, but that one third of them is borne by the ship, and two thirds by the cargo. *Marshall on Insurance, Chap. xiii.* *Park on Insurance.* *Jacob's Law Dict.* In the UNITED STATES, *average* and *partial loss* are understood by commercial men to mean the same thing, and *average other than general*, includes every loss for which the underwriter is liable, except *general average* and *total loss*, which last is considered as including *total loss with salvage*. *Partial loss* includes both *general and particular average*, and the latter term includes *all partial losses except general average*. *Wadsworth v. The Pacific Ins. Co.*, 4 *Wendell's Rep.* 33. See JETTISON. BILL OF LADING.

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ARREST AND DETENTION.—See CAPTURE.

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## BARRATRY.

THE original derivation of this term is extremely uncertain, and it is difficult to trace its signification from any of the accounts given of its etymology. The most probable supposition is, that it is derived from the *Italian* word, *barratrare*, which means to cheat. It is, however, an entirely technical expression as used in policies of insurance, denoting any act of the master or the mariners of a ship, which is of a criminal or fraudulent nature, or grossly negligent, and which tends to their own benefit, to the prejudice and without the privity or consent of the owners of the ship. *Park on Insurance.* *Marshall on Insurance.* *Jacob's Law Dict.* 15 *Wendell's Rep.* 16. 3 *Peters' Rep.* 222. *See Loss by BARRATRY.* *Appendix, 19, 357.*

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## BILL OF LADING.

A Bill of Lading is an instrument usually signed by the master of a ship, but occasionally by some one authorized to act on his behalf, whereby he acknowledges the receipt of merchandise on board of his vessel, and engages, under certain conditions and with certain exceptions, to deliver the same at the port of destination in safety, either to the shipper, or to such person as may be designated

by an assignment or order written thereon. It contains the quantity and marks of the goods, the names of the master, ship, shipper, and consignee, the places of departure and destination of the cargo, and the stipulated amount of freight, together with allowances recognized by the customs at the port of delivery, and known as *primage* and *average*. *Primage* amounts in some cases to a considerable per-cent upon the amount of freight stipulated, which is considered as a *perquisite* of the master of the ship. *Average*, as it is here used, consists of a claim reserved against the receiver of the goods, and which is divided *pro rata* between the owners of the ship and the proprietors of the cargo, for small items of expense, such as towing, pilotage, &c., when incurred for the general benefit. A Bill of Lading is transferable by endorsement, and the property in the goods may thus be passed ; strictly speaking, however, no person but the consignee can by any endorsement thereon pass the legal title to the goods. Three copies of it are usually executed, one of which is retained by the master, another by the shippers, and a third is enclosed to the consignee. In case the ship is lost, where there is an insurance on the goods, the underwriters require the production of one of the copies of the Bill of Lading, on the part of the person claiming under the policy, as evidence of the shipment having actually been made, and of the ownership of the goods. *Jacob's Law Dict.* *M'Culloch's Comm. Dict.* *Appen-*

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*dix*, 157, 229, 275, 308, 312, 320, 323, 344, 345, 362.

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### BILL OF SALE.

A Bill of Sale is a solemn contract under seal whereby a man passes away all the right, title and interest which he may have in goods and chattels. Its most important use, however, is in the transfer of property in ships, which being sometimes held in shares, cannot in general be delivered over on each change of part ownership. It is rendered necessary to the validity of all transfers of shares of British ships, by the registry acts of Great Britain; and it has been declared by our courts to be a material and important document, essential to the protection of the vessel, and necessary to be on board. *Jacob's Law Dict.* *McCulloch's Comm. Dict.* See REPRESENTATION, 6. Appendix, 323.

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### BLOCKADE.

“A blockade,” says Sir William Scott, “is a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human power can effect it, to be entirely cut

off." This is the clearest and most satisfactory definition of the term which can be found in the books. It seems to be an act done by virtue of the right or privilege which a belligerent nation claims, to seize any vessel which may attempt to touch, or has actually touched, at any of its enemy's ports, with which it has interdicted all trade and commerce. In order to constitute a good blockade, according to the recognized principles of the law of nations, it is essentially necessary that the force stationed should be sufficient to prevent the entry or exit of vessels. Besides this, to constitute such a blockade as the prize courts will recognize, it must be proved that the party violating it was aware of its existence at the time of doing so. It is not absolutely necessary that the power declaring a blockade should give formal notice of its existence. Yet a neutral will not be allowed with impunity to violate a blockade, of which it may reasonably be presumed, from the mere notoriety of the fact, the master of the vessel was aware. With regard to neutral vessels lying at the place where the blockade commences, the rule is, that they may freely retire after notice of its existence, taking with them the cargoes which they already have on board, but they are not to take in any new cargo. The blockade is violated either by entering the port, or by coming out of it, with a cargo taken on board after it commenced; or by approaching with an evident intention of entering, in case an entrance can be effected, and it seems that

a vessel will be rendered liable to seizure and condemnation, if it can be proved that she sailed with such an intention. If a ship has once violated a blockade, she continues subject to seizure for having done so, up to the termination of her homeward voyage. But in case the blockade is raised before her capture takes place, judgment of restitution will be pronounced. The effect thereof to the party violating a blockade if captured, is ordinarily the condemnation of both the ship and cargo. If, however, it is shown that the owners of the cargo, were not implicated in the offence committed by the master of the vessel, the cargo will be restored. And, on the other hand, cases have occurred where the owners of the cargo were themselves found to be the only guilty parties, and consequently the judgment has been for the condemnation of the cargo, and the restoration of the ship. It sometimes happens that a place is blockaded by sea only. Under such circumstances, the neutral may innocently carry on an inland commerce with it. That is, the neutral vessel may enter a neighboring port, not included in the blockade, with goods intended to be carried thence over land to the blockaded port. *The Vrow Judith, Robinson's Rep. Jacob's Law Dict. McCulloch's Comm. Dict. Chitty's Practical Treatise on the Law of Nations, 8vo. London, 1812. Disputes with America, Edinburgh Review, vol. xix. See ABANDONMENT, 12, 85. DEVIATION, 8. EVIDENCE, 5. WARRANTY, 12, 13, 14, 15, 39. Appendix, 364, 365.*

## BOTTOMRY.

THE term *Bottomry* is said to be derived from the Dutch or Low German, from the word *boden* or *bodem*, which formerly signified the keel or bottom of a ship, and ultimately came to be used to denote the ship itself. Previously to the seventeenth century, the word bottom was used in the English language to signify a ship, and it is now known very well in that sense as a mercantile phrase, as in the familiar expression, “shipping goods in foreign bottoms.” The contract of Bottomry is an agreement, in the nature of a mortgage, by which the owner or master of the ship borrows money to enable him to carry on the adventure, by fitting out the ship, or purchasing a cargo for the voyage, and as security for the re-payment of the same, he pledges the keel or *bottom* of the ship. The contract is usually expressed in the form of a bond, which is called a *Bottomry Bond*. And it is stipulated or understood, that if the ship is lost in the course of the voyage, by any of the perils enumerated in the contract, the lender loses his money. But if she returns in safety, then he shall receive back his principal, together with the premium or interest agreed upon, however it may exceed the legal rate of interest, which is usually called *marine interest*. The ship and tackle, if brought home, are answerable, as is also the person of the borrower, for the money lent. *Park on*

*Insurance.* *Marshall on Insurance.* *Jacob's Law Dict.* *McCulloch's Comm. Dict.* See **MARITIME LOANS.** **RESPONDENTIA.** **INSURABLE INTEREST**, 6. *Robertson & Bowne v. The United Ins. Co.*, 2 *Johns. Cases*, 250.

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### BROKER.

**CONTRACTS** of insurance are generally effected in all great mercantile ports, through the agency of brokers. They make it their duty to procure the names of underwriters to policies, and to settle with them the rate of premium, as well as the conditions upon which they engage to take the risk, and in case of loss, to receive from them the amount of their respective subscriptions. When the loss is partial, it devolves on the broker to arrange the proportion to be recovered from the insurers. He keeps running accounts with both parties, and becomes their mutual agent, and is in all cases personally responsible to the insurer for the amount of the premium, although he does not render himself liable to make good the amount insured, to the owner of the ship or goods, who are to look to the underwriters alone for indemnity, in the event of loss. The offices of insurance brokers, especially in this country, are frequently performed by merchants. *Jacob's Law Dict.* *McCulloch's Comm. Dict.* *Kent's Com.*, vol. 3. See **CONCEALMENT**, 6. **POLICY**, 12. *Appendix*, 49, 109, 110, 111.

## CAPTURE.

Capture, as applied to the subject of marine insurances, is the taking of the ship or goods belonging to the subjects of one country, by those of another, when in a state of public war. Or it may be by pirates, and with intent to deprive the owners of the property. It may be made with the intent to get possession of both the ship and cargo, or only to seize the goods of an enemy, or contraband goods which may be on board. The former is understood to be a capture of the ship in the proper sense of the word. The latter is an *arrest and detention*, without any design to dispossess the owner. A capture is considered to be *lawful* where it is made by a declared enemy, and according to the laws of war. It is *unlawful*, when made in contravention of the law of nations. *Park on Insurance. Marshall on Insurance. Jacob's Law Dict.* See LOSS BY CAPTURE.

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## CONCEALMENT.

“The learned judges of our courts of law,” says Park, “feeling that the very essence of insurance consists in a rigid attention to the purest good faith, and the strictest integrity, have constantly held that the contract is vacated and annulled by any

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the least shadow of fraud or undue concealment." And it will be observed that our own courts have always enforced the rigid observance of the same principle, and held that candor, openness, and sincerity, as well on the part of the insurer as of the insured, are indispensably necessary to give validity to the contract. And that both parties are equally and alike bound to disclose all facts or circumstances within their knowledge which are material to the interests involved in the contract, at the time it is executed. *Park on Insurance.* See REPRESENTATION. *Appendix*, 325, 326.

I. WHAT CONCEALMENT IS, AND ITS EFFECTS.

II. WHAT NEED NOT BE DISCLOSED.

1. ITS NATURE AND EFFECTS.

1. Every fact in the knowledge of the insured, which enhances the ordinary risk, and which, if it were disclosed, would increase the rate of premium, must be communicated to the underwriters. Justice Kent in *Seton v. Low*, 1 *Johns. Cases*, 1. *Ely v. Hallett*, 2 *Caines' Rep.* 57. *Appendix*, 177, 205, 325, 326.

2. If a person who is a subject of, and residing in a belligerent country, is beneficially interested, *as cestui que trust*, in property warranted neutral, his interest must be disclosed to the insurer. *Murray v. The United Ins. Co.*, 2 *Johns. Cases*, 168.

3. Where at the time of procuring the insurance, the insured had received notice that there was a violent storm at the port of departure about eleven

days after the vessel left it, but only communicated to the insurer generally, that there had been "blowing weather and severe storms" on the coast since she had sailed; *It was held*, that this was such a concealment as vitiated the policy. *Ely v. Hallett*, 2 *Caines' Rep.* 57. *See Appendix*, 178.

4. Where the insured sent orders by several conveyances, to have an insurance effected, and thereafter he himself, knowing that a loss had happened, arrived in the neighborhood of the place to which his letters containing such orders were directed, under an apprehension that no insurance had been effected, and on board of the vessel in which he knew was one of his letters directing the insurance; *It was held*, that he was bound to give his agent information of the loss, by the same mail which he knew would carry the letter ordering the insurance, and that the insurance effected under such circumstances was void, on account of the concealment. *Watsons v. Delafield*, 2 *Caines' Rep.* 224. *Same Case*, 1 *Johns. Rep.* 150. Affirmed in Error, 2 *Johns. Rep.* 526. *See Appendix*, 337, 338.

5. A vessel was insured from A. to B. Before the insurance was effected, another vessel had arrived at B. from A., having left A. subsequently to the sailing of the vessel insured from thence; *It was held*, that it could not thence be inferred that the insured was aware of a storm encountered by the vessel which had arrived, and that he concealed the fact. But that his communicating

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to the insurer that he had information of such vessels having sailed, was a sufficient intimation to the insurer, that a vessel which had sailed with or after the one insured had arrived. *Williams v. Delafield*, 2 *Caines' Rep.* 329.

6. A broker, in effecting an insurance, stated to the underwriter that it was expected that the vessel would sail at the latter end of September, or the beginning of October. On the morning of the same day on which the insurance was procured, a vessel arrived which brought information that the vessel insured had sailed about the third of October, which information was not communicated to the insurers. The court refused to grant a new trial, which was applied for, after the verdict of a second jury for the plaintiff, on the ground that this was a concealment of a material fact. *Livingston v. Delafield*, 1 *Johns. Rep.* 522.

7. A vessel of which the master was part owner, was cast away and lost about 90 miles from her port of destination, which was the residence of the other part owners, who, after the loss, but without having had information of it, effected an insurance. As there was no actual fraud in the case, it turned on the question of constructive fraud, on the ground that the master did not use due diligence in communicating intelligence of the loss; *It was held*, that inasmuch as the master did not direct the insurance, and was not apprized of any intention to insure, he was bound to use ordinary diligence only. *Andrews v. The Marine Ins. Co.*, 9 *Johns.*

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*Rep.* 32. *See Appendix*, 6, 56, 59, 126, 162, 163, 165, 206, 223, 224, 225, 228, 239.

## 2. WHAT NEED NOT BE DISCLOSED.

8. The insured is not bound to disclose to the insurer any circumstances relating to risks which the latter does not assume, or which are excluded either by an express or implied warranty, or as to which there is a warranty. *Walden v. The New-York Firemen's Ins. Co.*, 12 *Johns. Rep.* 128. In Error, 12 *Johns. Rep.* 513. *De Wolf v. The New-York Firemen's Ins. Co.*, 20 *Johns. Rep.* 214. In Error, 2 *Cowen's Rep.* 56.

9. So the insured, unsolicited, is not bound to disclose circumstances relative to the sea-worthiness of the vessel, or facts which go to show carelessness or want of economy in the master, provided these do not tend to impeach his honesty. *Walden v. The New-York Firemen's Ins. Co.*, 12 *Johns. Rep.* 128, in Error, 513. *See Appendix*, 251.

10. For the insured is bound to employ a captain of competent nautical skill and of general good character. And as facts or information as to his carelessness, extravagance, or want of economy, are not material to the risk of barratry, they need not be disclosed. *Ibid.*

11. Nor is the insured bound to disclose that the goods are contraband of war, inasmuch as a trade by a neutral, in articles contraband of war is a lawful trade, and within them eaning of those

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words in the policy. *Seton v. Low*, 1 *Johns. Cases*, 1. *Schidmore v. Desdoity*, 2 *Johns. Cases*, 77. *Juhel v. Rhinelander*, 2 *Johns. Cases*, 120. Affirmed in Error, 2 *Johns. Cases*, 487.

12. It need not be disclosed that the insured is the subject of a belligerent state, and emigrated to this country *flagrante bello*, and became naturalized. *Duguet v. Rhinelander*, 2 *Johns. Cases*, 476. 1 *Caines' Cases in Error*, xxv.

13. And if the policy contains no warranty of neutrality, concealment of the fact that the residence of the insured is in a belligerent country, or of the interest of such person in the property, is immaterial. *Elting v. Scott*, 2 *Johns. Rep.* 157.

14. It is not necessary to disclose how long a vessel has been in the port whence she is insured, unless her being there antecedent to the insurance had enhanced the risk. *Kemble v. Bowne*, 1 *Caines' Rep.* 75. *See Appendix*, 340.

15. Nor is it necessary to disclose that she is a prize ship, unless there is a warranty or representation negativing her being a ship of that description. *Ibid.*

16. So also where there is no warranty or representation respecting it, the sailing with a false clearance is immaterial, and need not be disclosed. *Barnwell v. Church*, 1 *Caines' Rep.* 217.

17. If a vessel has on board a document which is usual and customary in the course of the trade in which she is engaged, although the fact of its being on board may expose her to capture and

condemnation, it need not be disclosed. *Le Roy v. The United Ins. Co.*, 7 Johns. Rep. 343.

18. The master of a vessel which was insured to *Martinique*, without specifying the port, was instructed by his owner to keep well to the eastward, and endeavor to make a particular port in *M.*, and in case he should be turned away by a cruiser, then to go to *L.*, and avail himself of the earliest opportunity to get to *M.*; but these instructions were not disclosed to the insurer; *It was held*, that the concealment of them was immaterial. *Talcott v. The Marine Ins. Co.*, 2 Johns. Rep. 130.

19. The underwriter is presumed to be acquainted with the situation and topography of the places to which the vessel is destined; so that if there are no havens or harbors on the coast to which she is insured, that fact will be presumed to be within his knowledge, and need not be disclosed. *De Longuemere v. The New-York Firemen's Ins. Co.*, 10 Johns. Rep. 120. See Appendix, 164, 168, 247, 329.

20. Where an assignment of the policy does not vary the risk, the insured need not notify the insurer that such assignment has been made. It cannot affect the insurer, unless in case of neutral property assigned to a subject or citizen of one of the belligerent parties. *Earl v. Shaw*, 1 Johns. Cases, 313.

21. It is always a question for the jury how far the non-disclosure of a paper, intentionally false,

is material to the risk. *Le Roy v. The United Ins. Co.*, 7 Johns. Rep. 343. See Appendix, 176. APPENDIX, 81, 125, 126, 164.

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**CONSTRUCTION OF POLICY.**—See POLICY, CONSTRUCTION OF.

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**CONTRIBUTION.**—See AVERAGE. LOSS BY AVERAGE CONTRIBUTIONS.

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**DETENTION.**—See LOSS BY DETENTION.

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### DEVIATION.

DEVIATION is a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the voyage specified in the contract of insurance. *Park on Insurance*, chap. xvii. *Marshall on Insurance*, chap. xii. It is not merely a going out of the track or usual course of the voyage, but comprehends also a departure from the express or implied terms of the contract. *Appendix*, 271. A deviation may be *actual*, or it may be only *intended*. The cases will show

**I. WHAT IS A DEVIATION.****II. WHEN A DEVIATION IS JUSTIFIABLE.****1. WHAT IS A DEVIATION.**

1. Both in *England* and in this country it is well settled, that where a voyage is commenced with the avowed intention on the part of the insured to go out of the direct course, and to stop at another port before proceeding to the port of destination, the voyage is, notwithstanding, the same as the one insured, so long as the *termini* are preserved. And if a loss happens before the vessel arrives at the dividing point, where she must diverge in order to go to the intended port, as there was only an intention to deviate and not an actual deviation, the insurer is liable. *Henshaw v. The Marine Ins. Co.*, 2 *Caines' Rep.* 274. *Silva v. Low*, 1 *Johns. Cases*, 184. Per Thompson, Ch. Justice, *Lawrence v. The Ocean Ins. Co.*, 11 *Johns. Rep.* 241. *See Appendix*, 16, 17, 40.

2. Where there was an insurance on goods "at and from New-York to Gothenburgh, and at and from thence to one port in the Baltic or North Sea, not south of the river Jade." The vessel arrived at Gothenburgh, and sailed from thence to St. Petersburgh, but meeting with accidents, necessity compelled her to put into Carlsham for repairs. She sailed thence on the 10th of November, for St. Petersburgh, but was compelled the next day, by stress of weather, to put back again to Carlsham. She was here detained by adverse

winds until the season had too far advanced to navigate the Gulf of Finland. The supercargo thereafter determined to send her to Stockholm. While she was proceeding thither, before she arrived at the point where the routes to Stockholm and St. Petersburgh diverged, she was captured by a French privateer and carried into Dantzic, and was subsequently condemned by the Court of Prizes at Paris; *It was held*, that there was not an actual deviation, but only an intention to deviate, and inasmuch as the loss happened before the vessel arrived at the dividing point, the insurers were liable. *Lawrence v. The New-York Firemen's Ins. Co.*, 11 *Johns. Rep.* 241. *In Error*, 14 *Johns. Rep.* 46.

3. A vessel insured "from N. to G. and one other port," may stay a reasonable time after her arrival at G., to make necessary inquiries as to a market, &c., without its being construed into a deviation. And what is a reasonable time is a question for the jury to decide. *Ibid.* *See Appendix*, 268.

4. If a vessel remains in port six months after the date of the policy, it is not a deviation, provided nothing occurs during that time to alter the risk. *Earl v. Shaw*, 1 *Johns. Cases*, 313.

5. Where the voyage in the contemplation of the parties is a *trading voyage*, remaining long at any port for the purpose of selling the cargo, when it is necessary for that purpose, does not amount to a deviation. Nor will a stay of three days before

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and off a harbour while seeking for a market, if such delay was necessary, amount to a deviation. *Gilbert v. Hallett*, 2 Johns. Cases, 296. See Appendix, 74, 117.

6. But staying an unusual and unnecessary time at such a port is a deviation. *Ibid.* See Appendix, 72.

7. It is a deviation, says Justice Kent, if by reason of her having contradictory papers on board, a vessel is captured and taken out of her course. *Goix v. Low*, 1 Johns. Cases, 341, 346.

8. A vessel was insured from New-York to Bordeaux, "the insured not to abandon if refused admittance or turned away, but may proceed to another near open port." The vessel was boarded off the coast of France by a British vessel, and informed of the existence of a blockade, and warned not to enter any port under the influence of France upon pain of capture and condemnation. The master having been advised to go to England, or return to America, proceeded towards England. The vessel springing aleak, and meeting with violent and adverse winds, he was compelled for her preservation to go into L'Orient, where the ship and cargo were seized under the Berlin decree; *It was held*, that notwithstanding the Berlin decree,\* the ports of

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\* The Berlin decree was issued on the 21st Nov., 1806. It declared the whole of the British Islands in a state of blockade, and all vessels of whatever country trading to them liable to be captured by the ships of France. It also shut out all British vessels and produce both from France

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France were not to be considered shut with reference to the ship insured. And that the terms "near open port" must be understood in a geographical sense, and that neither of the English ports could be considered a *near open port* to Bordeaux, consequently the attempt of the master to reach a port in England was a deviation which put an end to the liability of the underwriters on the policy. *Tenet v. The Phœnix Ins. Co.*, 7 Johns. Rep. 363.

9. A vessel was insured from New-York to Teneriffe, and for an additional premium, permission was given to proceed from Teneriffe to the Isle of May and Bonnavista, and at and from thence to New-York. The vessel arrived at Teneriffe, but was refused an entrance, as well as permission to land any of her cargo, until after having performed a quarantine of forty days. The master not choosing to do this went to Madeira, the nearest port where he could enter and land his cargo, where he sold and delivered it, and then proceeded for the Isle of May; *It was held*, that the going to Madeira from Teneriffe was a

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and from all the other countries subject to the authority of the French Emperor. By a subsequent decree issued soon after in aid of this, all neutral vessels were required to carry letters or certificates of origin, that is, attestations from the French Consuls residing at the ports whence they set out, that no part of their cargo was British. A similar decree was issued from Milan on the 27th December, 1807, declaring the British dominions in all quarters of the world to be in a state of blockade, and prohibiting all countries trading with each other in any articles produced or manufactured in the parts of the earth thus interdicted.

deviation. *Robertson v. The Columbian Ins. Co.*, 8 Johns. Rep., 491.

10. A vessel was insured "at and from Port Plata, in St. Domingo, to New-York." In going from Port Plata to Susua (which was in the district bearing the name of Port Plata, but about eighteen miles east of the port) to take in a cargo of mahogany, she was driven into the road or bay of Isabella in the same district, and there lost. She had a permit from the custom-house at Port Plata to go to Susua and obtain her cargo, and would have been obliged to return to Port Plata in order to pay duties, and get her clearance, such being the usual course of trade inasmuch as the custom-house and port of entry were confined to a particular place called Port Plata, the district bearing that name extending nearly one hundred miles along the coast of St. Domingo. It appeared also that Port Plata was a safe harbor, but that Susua and Isabella were open roads, and dangerous during the prevalence of particular winds; *It was held* that Port Plata proper and the district of Port Plata were different objects, and that the perils were different, and the going from Port Plata to Susua was a deviation. And that nothing but a clear, well-settled, and well-understood usage of trade could be sufficient to include both objects under the simple name of Port Plata. *Vos v. Robinson*, 9 Johns. Rep. 192. *See WARRANTY*, 38. *See Appendix*, 9, 18, 20, 60, 61, 140, 207, 254, 266.

**2. WHEN A DEVIATION IS JUSTIFIABLE.**

11. Going out of the usual course of the voyage, or putting into a port to meet with a convoy, in order to avoid a capture in case of real danger, or to seek the safest way home, if done *bona fide* and upon reasonable grounds for apprehension, is justifiable and will not amount to a deviation.

*Patrick v. Ludlow*, 3 Johns. Cases, 10.

12. If a vessel is pursued by a cruiser, and puts into an intermediate port to avoid being captured, the departure is justifiable and will not be considered a deviation. *Post v. The Phœnix Ins. Co.*, 10 Johns. Rep. 79.

13. If the master is refused an entrance at the port of destination, and waits there for some time under a reasonable expectation of being able ultimately to obtain it, the delay is excusable and it will not amount to a deviation. *Suydam v. The Marine Ins. Co.*, 2 Johns. Rep. 138.

14. Putting into a port in order to avoid a probable capture, while waiting for a favorable wind, is justifiable. *Ibid.* See *Appendix*, 73, 75.

15. The vessel arriving within sight of Madeira, which was her port of destination, the master saw a ship which he suspected to be a privateer, and went to the Cape de Verde Islands, where, as he was not able to repair the vessel, the voyage was broken up, and the insured abandoned. The vessel subsequently got some repairs and went to Lisbon; *It was held*, that her leaving the original

place of destination, without being warranted by any necessity, was a deviation ; and that if there had been any such necessity, it did not justify the breaking up of the voyage. *Neilson v. The Columbian Ins. Co.*, 1 Johns. Rep. 301.

16. An insurance was effected on cargo at and from Carlsham to St. Petersburgh. The vessel sailed from Carlsham on the 9th of November, 1813, and encountering adverse winds, attempted to get into Revel as a place of safety, but finding this impracticable, she put into Port Baltic on the 22d of November. Being there informed that it would be impossible to reach Constradt, on account of the ice, and the wind and weather becoming unfavorable, she sailed from Port Baltic on the 23d of November, with the intention of going to Revel, and struck a rock on a shoal and was lost ; *It was held*, that the captain having acted in good faith, and according to his best judgment, his going into Port Baltic, and afterwards attempting to get into Revel was justifiable, and not a deviation. *Graham v. The Commercial Ins. Co.*, 11 Johns. Rep. 352.

17. If a vessel is obliged from necessity to put into a port, and part of her cargo is there necessarily taken out, in order to give her repairs, and being found damaged is sold, without occasioning her any delay, it is not a deviation and will not avoid the policy. *Kane v. The Commercial Ins. Co.*, 2 Johns. Rep. 264.

18. A vessel was insured from New-York to

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Bordeaux, and had French passengers on board. In order to avoid a detention by British cruisers then off the Hook, the owners instructed the master to go to sea through the Sound. The master went through the Sound, instead of going through the Narrows to the Hook, the latter of which was the most usual and least dangerous route ; *It was held*, that this was not a deviation. *Reade v. The Commercial Ins. Co.*, 3 Johns. Rep. 352.

19. A deviation from necessity is excusable in case of an insurance against a particular risk, as well as in the case of a general insurance. *Robinson v. The Marine Ins. Co.*, 2 Johns. Rep. 89. *Watson v. The Marine Ins. Co.*, 7 Johns. Rep. 57. See LOSS, 34. APPENDIX, 62, 73, 75, 99, 139, 200, 208, 209, 211, 257, 272, 273.

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#### DOUBLE INSURANCE.—*See INSURANCE.*

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#### EMBARGO.

AN embargo is only a temporary restraint upon national intercourse, and while it suspends, it does not declare such intercourse to be in itself unlawful. APPENDIX 215. *See ABANDONMENT*, 13, 14, 28, 90. *Frances v. The Ocean Ins. Co.*, 6 Cowen's Rep. 404.

## EVIDENCE.

1. THE date of a policy of insurance is not conclusive evidence of the time when it was subscribed, *Earl v. Shaw*, 1 *Johns. Rep.* 313.

2. Stopping at an intermediate port with the avowed intention of procuring seamen, is sufficient evidence either that the crew are not competent, or that they are not engaged for the voyage insured. *Silva v. Low*, 1 *Johns. Rep.* 184.

3. The sentence of a foreign Court of Admiralty condemning a vessel as lawful prize, is not conclusive evidence as to the character of the property, or as to the breach of a warranty of neutrality. It affords no *judicial inference* of the vessel's being *enemy's property*, as there may be other just causes for condemnation. *Goix v. Low*, 2 *Johns. Cases*, 480. *Vandenheuvel v. The United Ins. Co.*, 2 *Caines' Cases in Error*, 217. *Johnson & Weir v. Ludlow*, 2 *Johns. Cases*, 481. *Laing v. The United Ins. Co.*, 2 *Johns. Cases*, 487. *Rhinelander v. Juhel*, 2 *Johns. Cases*, 287. *Kemble v. Rhinelander*, 3 *Johns. Cases*, 130. *See APPENDIX*, 278, 280, 281, 305.

The Supreme Court held *contra* in these and the following cases, in each of which its decision was reversed. *Goix v. Low*, 1 *Johns. Cases*, 341. *Vandenheuvel v. The United Ins. Co.*, 2 *Johns. Cases*, 127. *Laing v. The United Ins. Co.*, 2 *Johns. Cases*, 174. *Ludlow v. Dale*, 1 *Johns.*

*Cases*, 16. *Haskin v. The New-York Ins. Co.*, and *Vandenheuvel v. Church*, 2 Johns. *Cases*, 173, note, and see 2 *Caines' Cases in Error*, 348.

4. The sentence of a foreign Court of Admiralty is only *prima facie* evidence of any fact, and will have no effect if sufficient appears in it to rebut the presumption of such a fact. *Laing v. The United Ins. Co.*, 2 Johns. *Cases*, 487. *Johnson & Weir v. Ludlow*, 2 Johns. *Cases*, 481. 1 *Caines' Cases in Error*, xxix. *The New-York Firemen Ins. Co. v. De Wolf*, 2 *Cowen's Rep.* 56. *Francis v. The Ocean Ins. Co.*, 6 *Cowen's Rep.* 404. See APPENDIX, 283, 296, 304, 306, 310, 313, 314, 322.

5. A sentence of condemnation directly on the ground of a breach of a blockade *de facto*, is only *prima facie* evidence of the existence of such blockade. And if the jury have doubts that the blockade existed at the time of the capture, it is not sufficient to authorize them to find a verdict for the plaintiff. *Radcliff v. The United Ins. Co.*, 9 Johns. *Rep.* 277. See APPENDIX, 282.

6. The libel and sentence of a foreign court are not evidence of the statute law upon which they are founded. The statute or written law of foreign countries should be proved by the law itself. The unwritten law may be proved by witnesses. *Francis v. The Ocean Ins. Co.*, 6 *Cowen's Rep.* 404. See APPENDIX, 234, 235.

7. Evidence may be produced to show that an adjustment endorsed on a policy and signed by the insurer was made on the misrepresentation

of the insured. *Tangier v. Hallett*, 2 Johns. Cases, 233.

8. The capture of a neutral by a belligerent is *prima facie* evidence of a total loss. *Murray et al. v. The United Ins. Co.*, 2 Johns. Cases, 263.

9. Where a policy of insurance is clear, certain, and unambiguous as to the voyage insured, propositions asking the rate of insurance for another voyage cannot be resorted to to show that the voyage insured was meant to be restricted to that described in such propositions. But they may be left to the jury as evidence of fraud. *Vandervoort v. Smith*, 2 Caines' Rep. 155. *See APPENDIX*, 187.

10. A representation to one underwriter is not evidence of a representation to a subsequent underwriter on a different policy on the same vessel and against the same risks. *Elting v. Scott*, 2 Johns. Rep. 157.

11. A copy of the register of a vessel, certified by the collector to be a true copy, is not, on proof of the handwriting of the collector, sufficient evidence to show the interest of the insured, or a compliance with the warranty of American property. And as the collector has authority to grant only a copy to accompany the vessel, and not to give copies generally, a copy offered in evidence at the trial of a cause must be authenticated in the usual way, that is, by the oath of a witness who has compared it with the original. *Coolige*

v. *The New York Firemen's Ins. Co.*, 14 Johns. Rep. 318. See APPENDIX, 292, 295, 323.

12. A copy of the registry of a vessel, from the treasury department of the United States, (where the original is required to be filed after a vessel is condemned) certified by the register of the department, and the fact of his being register verified by the certificate of the secretary of the treasury, under the seal of the department, is admissible evidence. *Catlett v. The Pacific Ins. Co.*, 1 *Wendell's Rep.*, 561.

13. Proof that there was a register is *prima facie* evidence that it was on board during the voyage. *Ibid.*

14. If information of the loss of a vessel is known in a place early in the morning, and on the same day at noon an insurance is there effected, it is no evidence of fraud on the part of the insured, although the information is brought by some of her crew who had arrived in the harbor the night previous, especially if there is no proof that they had been on shore. *Livingston v. Delafield*, 3 *Caines' Rep.* 49.

15. When in an action on a policy for a limited time, two storms are given in evidence, the one within and the other without the time, it is for the jury to decide, according to their judgment of the greater probability of her being lost in the first storm or in the last. *Browne v. Neilson*, 1 *Caines' Rep.* 525.

16. When the insurer sets up the breach of a

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condition by his adversary as a defence, he must produce evidence of the breach, or at least must rebut the general presumption by proof on his part. SPENCER, Senator. *The Ocean Ins. Co. v. Frances*, 2 *Wendell's Rep.* 64.

17. Admiralty surveys are not admissible as evidence to prove the facts recited in them. *Abbott v. Sebor*, 3 *Johns. Cases*, 39. *See APPENDIX*, 315, 316, 318.

18. *It seems*, however, that a survey as to the state of a vessel, although it is not conclusive, yet if honestly made, is very strong evidence. *Fontaine v. The Phœnix Ins. Co.*, 11 *Johns. Rep.* 293. *See APPENDIX*, 321.

19. Evidence is not admissible to show that a policy executed in *blank* is deemed by insurance companies, and the commercial community, equivalent to a policy, *for account of whom it may concern*. *Turner v. Burrows*, 8 *Wendell's Rep.* 144.

20. Upon the trial of the question whether certain articles are within the memorandum in a policy of insurance providing against particular average, evidence that the agent of the insured urged the taking of the risk, on the ground that the articles would be free from particular average, is inadmissible. *Astor v. The Union Ins. Company*, 7 *Cowen's Rep.* 202.

21. So is evidence going to show insurances at a higher premium on non-memorandum articles for the same voyage, by persons other than the underwriters to the policy in question, and that insu-

rance offices commonly charge a higher premium on such articles. *Ibid.*

22. The *slip*, or application for insurance, is not admissible in evidence to show the intention of the parties. It may be used in equity to correct the policy, but in a court of law it can be used for no other purpose than to show a misrepresentation. The policy is the only legal evidence of the agreement between the parties. *Dow v. Whetton*, 8 *Wendell's Rep.* 160.

23. Where a vessel warranted not to be employed in an illicit trade, is condemned by an admiralty court acting as a municipal court to carry into effect navigation laws, for a violation of those laws, it is incumbent on the insurer who seeks to support the allegation of a breach of such warranty, to prove the existence of the laws alleged to have been violated. Courts cannot judicially notice the municipal laws of foreign countries, but require them to be proved like other facts. Per *WALWORTH*, Chancellor. *The Ocean Ins. Co. v. Francis*, 2 *Wendell's Rep.* 64.

24. The facts of seizure and condemnation are not enough to support an allegation of a breach of warranty. The law under which the same is alleged to have taken place must be produced and proved. *Ibid, per SPENCER*, Senator.

25. A report made by the surveyors of a port into which a vessel has put in distress, that her repairs would cost \$20,000, when the vessel itself was valued at only \$10,000; and proof that upon

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such report and at the application of the master, the vessel was sold by an order of the Court of Vice-Admiralty, is sufficient evidence of a technical total loss, especially where the underwriters put their refusal to pay on other grounds. *Callett v. The Pacific Ins. Co.*, 1 *Wendell's Rep.* 561. See APPENDIX, 293.

26. Where part of a policy is written, and part of it is printed, and there is no contradiction between the two parts, and no ambiguity, parol evidence is not admissible to explain the intention of the parties. *Mumford v. Hallett*, 1 *Johns. Rep.* 433.

27. Where a policy contained the clause "the vessel sails under a sea-letter, without a register; property warranted American;" *It was held*, that parol evidence was not admissible to explain what was meant by a sea-letter. *Sleight v. Rhinelander*, 1 *Johns. Rep.* 192. *Contra in Error, Sleight v. Hartshorne*, 2 *Johns. Rep.* 531.

28. Parol evidence is admissible to show that by the general usage among merchants and underwriters in New-York, the word *roots* (which was first introduced into policies in New-York in 1787,) is confined to such roots as are perishable in their own nature, and that *sarsaparilla* is not a root perishable in its own nature, nor comprehended under that term in the memorandum. *Coit v. The Commercial Insurance Co.*, 7 *Johns. Rep.* 385.

29. Except in the special instance of explanations depending upon the usages of trade, parol

evidence is not admissible to contradict or vary a policy of insurance. *The New-York Ins. Co. v. Thomas*, 3 Johns. Cases, 1. *Astor v. The Union Ins. Co.*, 7 Cowen's Rep. 202. See APPENDIX, 288.

30. It is competent for the insured to show by parol proof, that according to the known usage of trade, or by the custom and practice as between assurers and assured, the word *proceeds* inserted in a policy is so understood among merchants as to include the *identical goods*, if brought back on the return voyage. *Dow v. Whetten*, 8 Wendell's Rep. 160.

31. And where such proof had been offered and rejected, and a judgment reversed, and a *venire de novo* awarded to enable the party to give his proof, the costs of reversing the judgment were ordered to abide the event of the suit, the court entertaining serious doubts whether such usage could be proved. *Ibid.*

32. The policy is itself evidence of the contract of insurance, and parol proof cannot be admitted to show that the party under the name of *freight* intended to insure the profits on his charter-party. *Mellen & Nesmith v. The National Ins. Co.*, 1 Hall's Superior Court Rep. 452. See APPENDIX, 286.

33. When the meaning of a word used to designate an article of trade is to be fixed by proof of mercantile usage, it is restricted to that class of merchants who deal in that article particularly. *Astor v. The Union Ins. Co.*, 7 Cowen's Rep. 202.

34. Whether a voyage was fair and lawful, or whether the vessel was or was not engaged in any illicit trade, are questions of fact and not of law. *The Ocean Ins. Co. v. Francis*, 2 *Wendell's Rep.* See **WARRANTY**, 26, 27, 44. **APPENDIX**, 44, 48, 190, 229, 275, 276, 277, 279, 287, 289, 290, 291, 294, 297, 298, 299, 300, 301, 302, 303, 307, 308, 309, 311, 312, 317, 320, 324.

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### FACTOR OR AGENT.

WHERE the insured employed a factor or agent to settle with the insurers for a total loss, after an abandonment was duly made. The factor afterwards through some mistake, or misapprehension of a letter of the insured, or from negligence, adjusted the claim with the underwriters as an average loss, *at 20 per cent.*, and cancelled the policy; *It was held*, that as the factor had through mistake or design, disobeyed his instructions, he was to be considered as substituted in the place of the insurers, and responsible for the whole amount. *Rundle and others v. Moore and Pollock*, 3 *Johns. Cases*, 36. See **BROKER**. **POLICY**, 51, 52, 53. **APPENDIX**, 243, 244, 245, 256.

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### FRAUD.—See CONCEALMENT.

## FREIGHT.

*Freight* is the price paid for the carriage of goods from one place to another by sea. Or rather it is the price paid for the use of a vessel to transport goods, and for the cargo or burthen of the ship. The usual manner of freighting ships is either by the ton or the great, and as regards time the freight is agreed upon at so much per month, or at a certain specified sum for the whole voyage. If a ship is freighted by the great, and she is cast away, the freight is lost. But if the freight is agreed upon at so much per ton, or at so much for every piece of commodities, and she is cast away, and part of the goods are saved, it is said she ought to be answered her freight *pro rata*. *Park on Insurance. Marshall on Insurance. Jacobs' Law Dict.* The insurer on freight engages that it shall be in the power of the insured to earn his freight. That is, that the subjects necessary to the earning of freight, the *ship* and *cargo*, shall not be so injured by any of the perils insured against, as that no freight can be earned. If the ship and cargo both remain in a state to continue the voyage, it is in the power of the insured to earn freight, and he ought to proceed. If by any injuries, either to the ship or cargo, the voyage is so broken up that no freight can be earned, the insured is entitled to recover a total or a partial loss, as he may or may

not have earned freight, *pro rata iteneris*. *Herbert v. Hallett*, 3 Johns. Cases, 95.

1. No other interest can be covered by an insurance on freight, than freight strictly so called. That is, an interest accruing to the insured for the use of the vessel of which he is owner—unless the insured has disclosed and the insurer is aware of the particular nature of the interest. *Riley v. Delafield*, 7 Johns. Rep. 522. *Cheriot v. Barker*, 2 Johns. Rep. 346.

2. If the charterer of a vessel should insure the freight, without any more particular designation of the nature of his interest, he cannot recover any thing in case of loss, inasmuch as he has no insurable interest. For the policy being on freight generally, cannot be considered to be on freight earned. *Cheriot v. Barker*, 2 Johns. Rep. 346.

3. Where A. sells a vessel to B., and it is agreed that A., the vendor, should have the benefit of the freight to arise from a voyage for which A. had previously chartered the vessel; *It was held*, that the interest of A. was not freight, and could not be insured *eo nomine*, unless accompanied with a disclosure of the particular nature of his interest. *Riley v. Delafield*, 7 Johns. Rep. 522.

4. An insurance was effected on freight from New-York to Havana, and the vessel was stranded in a gale of wind at Sandy Hook, but in three or four days thereafter returned to New-York. The cargo was unladen and brought back to New-York, in rather a damaged state, and given to the several

shippers. In about two weeks the vessel was repaired at an expense of \$120, and soon thereafter the plaintiff sent her on a different voyage ; *It was held*, that the insured ought to have insisted on carrying on the goods in order to entitle himself to freight, and that having lost the freight by his own negligence and folly, the insurers were not liable, and he could not recover. *Herbert v. Hallett, 3 Johns. Cases, 93.*

5. If a ship has been injured by the perils of the sea, but is capable of being repaired within a reasonable time, it is the duty of the owner to make such repairs and to continue the voyage, to entitle himself to freight. *Ibid.*

6. If the goods only are damaged, and the ship is in a capacity to proceed, and the owner offers to carry on the goods, he will be entitled to his freight. If they are physically destroyed, he is not bound to proceed on the voyage. *Ibid.*

7. Where a vessel was driven back to her port of departure, and there abandoned as for a total loss, no progress consequently was made in the voyage, and no freight *pro rata itineris* earned, though the shippers accepted the goods ; *It was held*, that the loss on freight was absolutely total, that there was nothing which the insured on freight could abandon to the underwriters, and that, under these circumstances, the master was not bound to procure another vessel and proceed with the goods in order to warrant a recovery upon the policy on

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freight. *Center v. The American Ins. Co. of New-York*, 7 *Cowen's Rep.* 564.

8. It may safely be asserted, that when the vessel is disabled, so that she cannot proceed on the voyage, and another ship cannot be procured for less than half the freight in the policy, the insured on freight may abandon as for a total loss. *Ibid.*

9. This same case was carried into the court of errors, and it was there considered *questionable* whether shippers have a right to demand a return of the goods without paying freight, where a vessel meets with a disaster on the day after sailing, and returns to her port of departure to repair. *The American Ins. Co. v. Center*, 4 *Wendell's Rep.* 45.

10. A technical total loss of the vessel, constitutes or involves a loss of the freight. And where no freight *pro rata itineris* has been earned, or if the expense of sending on the cargo in another vessel will exceed *a moiety* of the freight agreed upon by the charter-party, it is a *technical total loss of the freight*, which will authorize the insured on freight to abandon. *Ibid.*

*See ABANDONMENT*, 18, 33, 34, 36, 39, 40, 71, 87, 88, 90, 93, 94, 95, 96, 97, 98, 99, 100, 101. *Loss*, 8, 22, 42, 53. *Risks*, 19, 20, 21, 22. *APPENDIX*, 66, 67, 68, 150, 153, 154, 221, 360, 361.

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GOODS.—*See LAWFUL GOODS.*

**INSURANCE.—*See POLICY.*****I. DOUBLE INSURANCE.**  
**II. RE-INSURANCE.****1. DOUBLE INSURANCE.**

*Double Insurance* is where the same person seeks to secure an indemnity for two sums instead of one, or for the same sum twice over, for the same loss, by having two separate insurances executed on the same interest, for the same risk. It differs from re-insurance in that it is made by the insured with a view to entitle himself to receive a double satisfaction in case of loss. Whereas, a re-insurance is made by a former underwriter, his executors, or assigns, to protect himself and his estate from a risk to which, by the first insurance, he had rendered them liable. A double insurance, although made with such a view as is above stated, is not void. Yet the person effecting it will not be permitted to recover a greater satisfaction than such as is equal to the value of the effects risked, although he should bring an action on each policy. But he is at liberty to proceed against either set of underwriters. And whichever of them pays the loss which he may have sustained, may call upon the other set of underwriters for a contribution proportional to the sums which they may have underwritten. *Park on Insurance.* *Marshall on Insurance.*

*Kent's Com.*, vol. 3. The American policies have introduced a clause into the contract whose effect is to prevent the operation of this rule of contribution, and to throw the liability exclusively on one set of underwriters, according to the priority in the date of the respective policies. This has introduced the designation of *Prior-Insurance*, which distinction seems to have become substituted for the term *Double Insurance*. Very few cases under this head seem to have come before our courts, and these have been disposed of as follows:

1. In a case where a vessel was valued at \$2,000, and an insurance was effected upon her for that sum, and there was another insurance effected on her of a prior date for \$3,000, the insured was permitted to show that she was worth enough to cover both policies; and thus entitle himself to recover a full indemnity from the several underwriters. *Kenny v. Clarkson*, 1 Johns. Rep. 385.
2. Where an insurance was made to the amount of \$15,000 on goat-skins, which were valued at 50 cents, and the policy contained the usual clause as to a prior insurance. A prior insurance had been made, by an open policy on the cargo on board of the same ship for the same parties, to the amount of \$22,000. The prime cost of the skins was 22 cents each. In estimating the skins at 50 cents each, and the rest of the cargo at the invoice prices, and deducting the prime cost of the skins, the amount was found sufficient for both policies. But the cargo, exclusive of the skins, was not suf-

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ficient to absorb the prior insurance. In an action on the second policy, *it was held*, that the whole of the goat-skins were to be valued at 50 cents each, and after deducting from this amount the invoice price of the cargo, charges, &c., exclusive of the goat-skins, and the \$22,000 on the amount of the prior-insurance, the remainder would express the interest covered by the second policy, and that it was immaterial whether the first policy was valued or open, if the skins, at 50 cents each, would furnish interest sufficient for both policies. *Kane v. The Commercial Ins. Co.*, 8 Johns. Rep. 229.

3. Where goods were insured from New-York to Tonnigen, and the insurance was expressed to be on *coffee valued at 25 cents per pound*, and the policy contained the usual clause as to prior-insurance. A prior open policy had been effected in London on the cargo of the same ship generally, consisting of *coffee, pepper, sugar and wood*. The vessel and cargo were lost, a small part only being saved. In an action on the second policy, *it was held*, that part of the cargo, *being pepper, &c.*, not included in the second policy, estimated at first cost without deducting the drawback, was to be deducted from the sum valued on the first policy including the premium, and the residue to be applied to the coffee at its prime cost and charges, including the drawback. And that the coffee which remained uncovered by the first policy, estimated at 25 cents per pound, with the difference between the first cost and the valuation on the quantity covered by

the first policy, together with the premium of insurance on the second policy, would constitute the amount of interest covered by the second policy. *Minturn v. The Columbian Ins. Co.*, 10 Johns. Rep. 75.

4. A policy of insurance was effected on goods "from Bayonne to New-York," to the amount of \$7,000. Afterwards another insurance was procured on the same goods, with different underwriters, "at and from Bayonne to the first port the vessel might make in the United States," valued at \$20,000. The vessel arrived safe in New-York; *It was held*, that the risk on the second policy was not divisible, and that the insured was not entitled to a return of the premium paid to the subsequent underwriters on account of so much of the amount subscribed by them as was covered by the prior insurance. *The Columbian Ins. Co. v. Lynch*, 11 Johns. Rep. 233.

5. *It seems*, that in order to constitute a double-insurance, the two insurances must not only be for the benefit of the same person, but also for the same entire risk. *Ibid.*

6. Where what is called the *American clause* is contained in a policy, that is, a proviso that in case of any subsequent insurance the insurer shall notwithstanding be answerable to the extent of the sum subscribed by him, without right to claim contribution from subsequent insurers, the insurer is precluded from claiming such contribution in case of loss upon the same cargo, even although at the

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time of the subscription there was alment sufficient for all of the policies. *The American Ins. Co. v. Griswold*, 14 Wendell's Rep. 399. See APPENDIX, 2, 134, 144, 145, 195, 250.

## 2. RE-INSURANCE.

Re-insurance is a contract which the first underwriter enters into in order to relieve himself from those risks which he has previously undertaken, by throwing them upon other underwriters, who are thence called *re-assurers*. It is prohibited in England, unless where the first insurer becomes insolvent or dies.

7. The first insurer is not bound to abandon, or to give notice to the re-insurer, when the first-insured abandons to him. The nature of the contract renders it unnecessary. *Hastie & Patrick v. De Peyster & Charlton*, 3 Caines' Rep. 190.

8. The re-insurer has no connection with the first insurance, and is bound to indemnify his own insured, to the full extent of his loss or liability to pay. *Ibid.*

9. The original insurer, notwithstanding his precaution in obtaining this indemnity, has a right to defend himself in any way he thinks proper against the party with whom he contracted, between whom and the re-insurer there is no privity at all. *Ibid.*

10. And the re-assurer may avail himself of any defence against his insured, which the latter might have urged against the first insured. *Ibid.*

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11. Therefore it is incumbent for the re-assured to know that the claim made by his insured against him is valid, and if after the latter has given notice to the re-insurer of a legal demand having been made on him, the re-insurer does not prevent the suit by payment thereof; he will be liable for the costs in the action by the first insured, as also for interest on all sums advanced by the re-insured. *Ibid.*

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### INSURABLE INTEREST.

A POLICY of insurance has been defined to be "a contract of indemnity arising upon an uncertain event." And the object of it is said to be not to make any positive gain, but rather to provide against, and to prevent any possible loss to the insured. It is plain that there can be no ground for such a contract, where the party who seeks to be benefitted by it, has no interest to be exposed to the risk against which an indemnity is agreed upon. Consequently it becomes essential from the very nature of the contract, that the insured should have an interest of some kind, whether it be absolute or qualified, legal or equitable, which is liable to injury or loss from the perils insured against. The term interest, however, as used in application to the right to insure, does not necessarily imply *property* in the subject of the insu-

rance. *Marshall on Insurance. Park on Insurance.* APPENDIX, 330. In effecting an insurance,

1. The insured is not required to state the particular interest or proportion of interest which he intends to have insured. Whether it be a distinct, or an undivided share, cannot be material. It is sufficient if he has an insurable interest to the amount in question. *Lawrence v. Van Horne*, 1 *Caines' Rep.* 276. *Turner v. Barrows*, 5 *Wendell's Rep.* 541.

2. The owner of a vessel hypothecated, has an insurable interest in her, and may insure generally without describing his interest. *Williams v. Smith*, 2 *Caines' Rep.* 13. *Kenny v. Clarkson*, 1 *Johns. Rep.* 385. See APPENDIX, 331.

3. But the owner of a vessel covered by a bottomry-bond for more than her value, has not an insurable interest. *Smith v. Williams*, 2 *Caines' Cases in Error*, 110.

4. A person purchases a vessel and takes possession and control of her. But as he is not able to pay all the purchase money, it is agreed that she shall remain in the name of the original owners, who are to give a bill of sale when the whole purchase money is paid. The vendee has an insurable interest, which may be covered by an insurance on the vessel generally. *Kenny v. Clarkson*, 1 *Johns. Rep.* 385.

5. A person holding a bottomry-bond has not an insurable interest. Such interest cannot be covered by an insurance on the vessel, unless the

particular nature of it is expressly mentioned in the policy. *Ibid. Robertson v. The United Ins. Co., 2 Johns. Cases, 250.*

6. A vessel was insured "from New-York to St. Bartholomews, and at and from thence back to New-York, with liberty to touch and trade at Martinique." The vessel had discharged her outward bound cargo at Martinique, and taken in part of her return cargo, when a loss happened; *It was held*, that if the cargo which was taken in at Martinique was intended for the United States, it was a breach of the non-intercourse law of the United States, passed the first of March, 1809, which was then in operation, and by which the vessel would be forfeited and the property become immediately vested in the United States, so that the owners could have no insurable interest therein. *Fontaine v. The Phænix Ins. Co., 11 Johns. Rep. 293.*

7. *M.* purchased the whole of a cargo in which *L.* was to be interested one-third, and which was charged to him by *M.* The invoice and bill of lading were made out in their joint names. Some time after, *L.* directed his correspondent to place the proceeds of the cargo to the credit of *M.*; *It was held*, that *M.* had not such a lien on the one-third belonging to *L.* as amounted to an insurable interest; and that *M.*, who had insured the whole cargo, and had averred an interest in the whole, could not recover for more than two-thirds. *Murray v. The Columbian Ins. Co., 11 Johns. Rep. 302.*

8. One whose interest was not intended to be insured, is not entitled to recover under a policy effected by others, even although by the terms of it his interest would seem to be covered. *The Pacific Ins. Co. v. Catlett*, 4 *Wendell's Rep.* 75.

9. The owner of a cargo, without being requested to do so by the owner of the vessel, repaired her on her voyage, and in his own name effected an insurance on his expenditures for repairs; *It was held*, that he had not an insurable interest. And that as the repairs were voluntarily bestowed they belonged to the vessel, and the property in them vested in the owner. *Buchanan v. The Ocean Ins. Co.*,<sup>6</sup> *Cowen's Rep.* 318.

10. The charterer of a ship, being the party who is to pay freight, and not liable to pay it unless the vessel arrives in safety, has no interest in the freight *as such*, and cannot therefore insure it *eo nomine*. *Robbins v. The New-York Ins. Co.*, 1 *Hall's Superior Court Rep.* 325. *Mellen & Ne-smith v. The Mutual Ins. Co.*, *Ibid.* 452.

11. *It seems*, however, that an advance of freight-money may be insured under the general name of freight. But to enable the charterer to recover the amount from the underwriter, he will be required to prove the fact that an advance was made. *Robbins v. The New-York Ins. Co.*, 1 *Hall's Rep.* 325. *See Williams v. Smith*, 2 *Caines' Rep.* 13, note a. **POLICY, Persons Effecting.** APPENDIX, 4, 133, 136, 274, 331.

INSURANCE BROKERS.—*See* BROKER.

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### JETTISON.

JETTISON is the throwing goods overboard in a storm for the purpose of relieving the ship, and thereby promoting the general safety of the ship and cargo. Three things are requisite to render the act legal. 1. It must be done after a deliberate and voluntary consultation between the master and the men. 2. The ship must be in actual distress so as to render the sacrifice necessary for the preservation of the remainder. 3. The saving of the ship and cargo must be the consequence of such jettison. Some writers on insurance regard the second as the only material requisite to justify a jettison. If it does not accomplish the safety of the ship, the goods which may chance to be saved are not liable for contribution. If she is preserved by these means, and subsequently lost, the property saved from the second peril will be liable to contribution for the loss caused by the former jettison. *Park on Insurance.* *Marshall on Insurance.* *Kent's Com. vol. 3.* *Jacob's Law Dict.* *See POLICY, 38<sup>a</sup>.*

## LAWFUL GOODS.

1. ALL goods, the traffic in which is not prohibited by the positive law of this country are lawful goods, and within the intention of those words in a policy of insurance. *Seton v. Low*, 1 *Johns. Cases*, 1. *Gardiner v. Smith*, 1 *Johns. Cases*, 141. *Skidmore v. Desdoity*, 2 *Johns. Cases*, 77.

2. And such goods are lawful although contraband of war. *Ibid. Juhel v. Rhinelander*, 2 *Johns. Cases*, 120. *In Error*, 2 *Johns. Cases*, 487.

3. The law of nations does not declare the trade in contraband goods to be unlawful ; it only authorizes the seizure of them by the belligerent powers, and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade, although the belligerent powers have a right to seize and confiscate the contraband goods. *Seton v. Low*, 1 *Johns. Cases*, 1.

4. Goods owned by the subject of a belligerent nation are covered by a policy on "all lawful goods, &c., against all risks." They are lawful within the meaning of such a policy. *Skidmore v. Desdoity*, 2 *Johns. Cases*, 77.

5. Where, during the existence of an act of Congress prohibiting intercourse with France and her dependencies, a vessel was compelled to put into a French port in distress, and part of her cargo was taken out by the government, and the residue

only permitted to be bartered for the produce of the place, of which the cargo insured consisted; *It was held*, that this was not an illegal trade. *Jenks v. Hallett*, 1 *Caines' Rep.* 60. In Error, 1 *Caines' Cases*, 43.

6. Provisions which are shipped by a neutral with a view to supply the army or navy of a belligerent are not contraband of war, but are perfectly lawful. *The New-York Firemen Ins. Co. v. De Wolf*, 2 *Cowen's Rep.* 56.

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## LAW OF NATIONS.

*See LAWFUL GOODS, 3. WARRANTY, 24. APPENDIX, 363, 364.*

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## LOSS.

A *loss*, as the term is understood in policies of insurance, is such an injury or damage as the insured may have sustained in consequence of encountering any of the perils against which the underwriter, for the premium stipulated, has undertaken to indemnify him. It is either absolutely or constructively total. In the latter case it is usually called a *technical total loss*. It is *total* where the contemplated voyage is wholly lost or defeated, or

becomes not worth pursuing, or where the projected adventure is itself entirely frustrated. It is a *constructive or technical total loss* where the thing insured, although it is not entirely destroyed, is nevertheless lost as to any benefits which the owner may have expected to derive from it. There is also another kind of loss which is called *partial loss*, and which occurs where the damage or injury sustained by the subject insured is less than a total loss, or not such as may be considered technically total. This is also sometimes called an *average loss*, because it partakes of the nature of such losses as are made the subject of *average contributions*. *Park on Insurance.* *Marsh on Insurance.* *Jacobs' Law Dictionary.* *Kent's Commentaries*, vol. 3. *McCulloch's Commercial Dictionary.* Losses are ordinarily occasioned—

- I. BY THE PERILS AT SEA.**
- II. BY CAPTURE.**
- III. BY ARREST AND DETENTION.**
- IV. BY BARRATRY.**
- V. BY AVERAGE CONTRIBUTIONS.**
- VI. BY DEATH OF ANIMALS.**
- VII. ON PROFITS.**
- VIII. ON COMMISSIONS.**

#### **1. BY PERILS OF THE SEA.**

- 1. Generally speaking, there is no precise time**

after which a vessel which has not been heard of, will be presumed to be lost; it will generally depend upon the circumstances of the case. *Gordon v. Bowne*, 2 Johns. Rep. 150. See APPENDIX, 210.

2. But where a vessel was bound from North Carolina to New-York, and had not been heard of for a year, it was presumed that she was lost. *Ibid.*

3. In judging whether a vessel which is missing has been lost during the voyage for which she was insured, the rule is, if she does not arrive within the usual limits of the voyage she ought to be presumed to be lost. But the utmost or greatest period for the performance of the voyage is not a reasonable basis for the calculation. *Brown v. Neilson, Caines' Rep.* 525.

4. Where, in an action on a policy of insurance, two storms were given in evidence to prove the loss, and the insurance was made after a knowledge of the first storm; *It was held*, that the jury were not precluded from finding that the vessel was lost in the first storm. *Ibid.*

5. A vessel puts into a port of necessity and is repaired, and afterwards proceeds on her voyage and is totally lost. The insured is entitled to recover the partial loss arising from the repairs, and general average consequent thereon, *in addition* to the total loss. *Saltus v. The Commercial Ins. Co.*, 10 Johns. Rep. 487.

6. Where a policy contained a clause that "the

insurers took no risk but sea-risk ;" and the vessel, while in port, was driven on shore, and could not be got off unless at an expense exceeding half her value, and was thereafter taken possession of and burnt by an armed force ; *It was held*, that this was a loss by sea-risk and not by burning. *Patrick v. The Commercial Ins. Co.*, 11 Johns. Rep. 9.

7. Yet as there was no proof which showed that the cargo had been impaired by the stranding of the ship ; *It was held*, that the loss of the *cargo* was not occasioned by sea-risk, but was to be attributed solely to the subsequent burning. *Ibid.*

8. An insurance was effected on *freight* from Riga to New-York. The principal part of the cargo was composed of hemp, and the remainder of manufactured goods and iron. The vessel having sprung aleak she put into Kinsale in distress. A survey was here had, and she was found incapable of being so repaired as to enable her to pursue her voyage, unless at an expense equal to her value. Upon the advice of the merchants and other persons at Kinsale, the master sold the hemp there, and shipped the balance of the cargo in another vessel for New-York. This latter vessel was not capable, however, of taking more than one third of the hemp, as there was no machinery at hand to pack and stow it away in the Russian mode ; *It was held*, that the insured was entitled to recover for a total loss of the freight, inasmuch as it did not appear that the goods re-shipped for New-York had reached there, or that any freight

had been earned. *Saltus v. The Ocean Ins. Co.*, 12 Johns. Rep. 107.

9. A vessel was insured, and "warranted free from any loss by the British or Americans; but in case of capture, the usual sea-risks to continue." She was captured by the British, and while detained by the captors was lost in consequence of their negligence; *It was held*, that if the loss had been occasioned by a sea-risk strictly so called, the insurers would have been liable. But inasmuch as the immediate and proximate cause of the loss was an act of the captors, which if it had been done by the insured would have exonerated the insurers, the latter were in this case protected by the warranty. *Coolidge v. The New-York Firemen Ins. Co.*, 14 Johns. Rep. 308.

10. To constitute a *technical total loss* of a ship by damage from the perils insured against, she must be injured to the amount of more than half her value, after deducting the one-third, *new for old*, allowed the underwriters. The doctrine of a technical total loss is expressly founded on the supposition that the subject insured has been deteriorated to more than one-half of its value. *Smith v. Bell and others*, 2 Caines' Cases in Error, 153.

See ADJUSTMENT, 22, 23, 24, 25, 26. APPENDIX, 98, 104, 116, 149, 219, 253, 351, 352.

## 2. BY CAPTURE.

11. Where a vessel was captured and deprived of all her papers and never regained them, and was

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thereafter recaptured, and restored upon payment of salvage ; *It was held*, that the insured was justified in breaking up the voyage, and that there was a total loss by capture, inasmuch as the ship was not in a legal capacity to perform her voyage after having lost her papers. *Post v. The Phœnix Ins. Co.*, 10 Johns. Rep. 79.

12. A policy was effected on goods, from Philadelphia to St. Sebastians. It was "warranted not to abandon if detained or captured, if the property is released in six months after notice to the insurers, no risk taken in port but sea-risk." When she was about two leagues from land, and about four leagues from St. Sebastians, the vessel was boarded by an armed launch, and a prize master and eight men were put on board of her. They took the vessel into Port Passage, where she was compelled to perform quarantine for eight days, at the expiration of which time, her hatches were sealed by the French consul, and the master and supercargo ordered to St. Sebastians. Some time after this, a French pilot and crew were put on board of her and the vessel was sent to Bayonne ; the cargo was here sequestered, and afterwards landed and put into the public stores, by order of the French government ; *It was held*, that this was a total loss by capture, and not by seizure in port. *Duval v. The Commercial Ins. Co.*, 10 Johns. Rep. 278.

13. Where an American vessel sailed from Gothenberg bound to St. Petersburgh, the next day

after a British convoy had sailed, and came up with the convoy the day after she sailed, and kept company with the convoy through the Belt, but without receiving or exchanging any signals or receiving any assistance from the convoy, and without altering her course or retarding her voyage on account of the convoy; *It was held*, that this was not sailing under British convoy, so as to effect the right of the insured to recover for a total loss in consequence of a capture by the French, notwithstanding the cause of the condemnation was stated to have been the fact of her having sailed under British convoy. *Lawrence v. The Ocean Ins. Co.*, 11 *Johns. Rep.* 241.

14. After capture and re-capture the insurer is liable only for the salvage, and for losses within the policy. He is not liable for the expenses attending a sale of the property at auction, by direction of the consignee of the insured. *Muir & Boyd v. The United Ins. Co.*, 1 *Caines' Rep.* 49. See APPENDIX, 218.

15. The insurer is liable for expenses incurred in prosecuting an appeal against captors, where he has had notice of the proceedings having been instituted, and does not signify his dissent, even although such expenses may exceed the amount of his subscription. And it is competent for the jury to decide as to the amount of such expenses, whether reasonable and proper, and what proportion of them must be paid by the insurer. *Lawrence v. Van Horne*, 1 *Caines' Rep.* 276.

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16. The capture of a vessel under convoy, by the commander of the convoy, for the purpose of protecting her from belligerent capture, will not exonerate the insurer in case of loss. *Gouverneur & Kemble v. The United Ins. Co.*, 1 Caines' Rep. 592.

17. An insurance was effected on goods from New-York to Guadaloupe, and the vessel was captured by a British cruiser and carried into Antigua and libelled. The master put in a claim and the goods were detained for further pay, but were delivered to the master, on his paying the costs and giving security for their appraised value. The master procured A., a merchant of Antigua, to give the security, as also to pay the costs and other expenses for the ship and cargo. For the indemnity of A., he drew bills of exchange on his owner in New-York, pledging the ship and goods to A., to secure the amount, which included also a commission of 5 per cent. charged by A. on the sums advanced by him, and a premium of insurance paid by him to insure the ship and cargo so pledged, from Antigua to New-York. The cargo was delivered to the agent of A., at New-York, and the insured, in order to get possession of the property, paid his proportion of the charges and expenses, including the commission and premium of insurance; *It was held*, that as the master had acted in good faith, and the charges were reasonable and necessary, the insured were entitled to recover from the underwriters the amount so paid.

*Fontaine v. The Columbian Ins. Co., 9 Johns. Rep. 29.*

18. Where goods insured were captured during the voyage, and the vessel was released, but the goods were detained for further proof, and were subsequently restored on paying the full freight, and the owner was obliged to hire another vessel to carry the goods to their place of destination ; *It was held*, that the insurer was liable to pay this additional or increased freight, inasmuch as it was an expense to which the insured was subjected in consequence of the capture. *Mumford v. The Commercial Ins. Co., 5 Johns. Rep. 262.*

### 3. BY ARREST AND DETENTION.

19. Detention in port, on suspicion of a breach of neutrality, is a loss within the meaning of the policy. *Smith v. Steinback, 2 Caines' Cases in Error, 158.*

20. Where a cargo was insured from New-York to Cherbourg in France, and the policy contained the clause, " warranted free from seizure on account of any illicit or prohibited trade ;" the vessel met with an English cruiser and was compelled to go into the outer road of Plymouth, where she was detained six hours and then suffered to proceed, but no person belonging to the vessel went on shore during the time of her detention. The vessel and cargo arrived at *Cherbourg* and were seized under the *Berlin* decree, and confiscated, on the alleged ground that the captain, on being

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examined by one of the officers at the port, had made a false declaration saying that he had not been in England ; *It was held*, that this was not a loss arising from any illicit or prohibited trade, but under the general peril of *arrest and detention of princes*, and that the insurers were liable. *Mumford v. The Phænix Ins. Co.*, 7 Johns. Rep. 449. *See DEVIATION*, 8, note.

21. Where a vessel which has been chartered at so much per month, is detained by an embargo, the charterer who has had his cargo insured, cannot recover from the insurer the hire paid for the vessel during her detention. There is an evident distinction between detention by capture and by an embargo, *Penny v. The New-York Ins. Co.*, 3 Caines' Rep. 155. *Barker v. The Phænix Ins. Co.*, 8 Johns. Rep. 307.

22. During a detention by an embargo the wages of the crew are not chargeable to the ship, nor are they general average, but they fall exclusively on the freight. *M'Brude v. The Marine Ins. Co.*, 7 Johns. Rep. 431.

23. An insurance was effected on goods from New-York to Antwerp. During the voyage the vessel was carried by a British privateer, to Portsmouth, England, and released after a short detention. On arriving at Flushing Roads an armed force was put on board of her, which continued on board until her arrival at Antwerp, on the 21st of July, 1807. She was not permitted to land her cargo there nor to depart with it, an armed force

having been kept on board of her by the officers of the customs. On an application made by the consignee, leave was obtained from the French government, through its ministers, to land the cargo under the direction of the officers of the customs, on condition that it should be placed in deposite in the custom-house stores until the decision of the Emperor of France could be obtained. It remained in this state of sequestration until 1810, when it was sold by order of the Emperor of France, and the proceeds were paid into his *Caisse d'a mortissement*; *It was held*, that there was a total loss of the cargo by the *arrest, restraint, and detention* of the French government. *Gracie v. The New-York Ins. Co.*, 13 Johns. Rep. 161.

24. A vessel while prosecuting the voyage on which the insurance is effected puts into a port where by the terms of policy she is permitted to enter and stop. While she is there the place becomes closely invested by the cruisers of the enemy of the country to which she belongs, so that if an escape is attempted she must inevitably be captured. This is considered to be a detention by *restraint of princes and of men of war, &c.*, within the meaning of the policy. *Saltus v. The United Ins. Co.*, in Error, 15 Johns. Rep. 523.

25. In a policy on a ship, where a total loss is sustained, *by seizure, &c.*, the insured is entitled to recover all expenses fairly incurred in obtaining a restoration of the proceeds of the ship on condemnation and sale. *Francis v. The Ocean Ins. Co.*,

6 *Cowen's Rep.* 404. Cases there cited on this point. *Watson v. The Marine Ins. Co.*, 7 *Johns. Rep.* 57. *Maggrath v. Church*, 1 *Caines' Rep.* 215. *Jumel v. The Marine Ins. Co.*, 7 *Johns. Rep.* 425. *M'Brade v. The Marine Ins. Co.*, 5 *Johns. Rep.* 298. See ABANDONMENT, 57. RISKS, 20. APPENDIX, 101, 214.

#### 4. BY BARRATRY.

26. A fraudulent act of the master, in his character of master, and in breach of his relation and duty as master, is barratry. And it need not be made to appear affirmatively that the fraud was committed for his benefit. The law will intend that it was done to the injury of the owner until the contrary appears. *Kendrick v. Delafield*, 2 *Caines' Rep.* 67.

27. Barratry may be committed by the master of the ship in respect to the cargo, though the owner of the cargo is not at the same time the owner of the vessel, and although the master is also supercargo or consignee for the voyage. He cannot lay aside his character and responsibility as master, until the vessel has performed her voyage, and arrived at her port of destination. *Ibid. Cook v. The Commercial Ins. Co.*, 11 *Johns. Rep.* 40.

28. The insurers are not liable where the fault, negligence, or misconduct, of the master or mariners does not amount to barratry. *Grim v. The Phænix Ins. Co.*, 13 *Johns. Rep.* 451.

29. Barratry is an act done with a fraudulent intent, or *ex maleficio*, and consequently acts of mere carelessness or simple negligence do not amount to Barratry. *Ibid.* See APPENDIX, 196.

29<sup>a</sup>. As where a vessel was insured, among other risks, against *fire*, and during her voyage a seaman carelessly put a lighted candle in the binnacle, which took fire and communicating to some powder on board, the vessel was blown up and wholly lost; *It was held*, that the insurers were not liable for the loss. *Ibid.* APPENDIX, 357, 358.

30. If the master of a vessel lades on board of her such goods as will subject her to condemnation for illicit traffic, without the consent or knowledge of the owner, it is barratry. And where there is a warranty against seizure on account of illicit trade, the underwriters will be liable for a loss from illicit trade thus barratrously carried on by the master. *Suckley v. Delafield*, 2 Caines' Rep. 222.

31. But where the master is also owner of the vessel, the insurer will not be held liable for a loss by barratry. His ownership of the vessel, however, is a fact to be established by the insurer; it is not incumbent on the insured to show that the master is not owner. *Steinback v. Ogden*, 3 Caines' Rep. 1. See *Kendrick v. Delafield*, 2 Caines' Rep. 67.

32. A fraudulent sale and purchase by the master of a vessel is not such evidence of his ownership as to afford a defence to a claim for loss occasioned

by his barratry. It cannot be made the basis for establishing any rights or exonerating from any responsibilities. *Ibid.*

33. A person contracting and dealing with a master, who has purchased in his owner's vessel, in his capacity of master, may recover under a count for barratry, a loss occasioned by the fraudulent conduct of such master. *Ibid.*

34. If the insured is apprised by his master of his pursuing another voyage than the one for which the insurance is effected, and on which he has been sent, and does not disapprove of it, it amounts to nothing more than a deviation, it is not barratry, though the master may ultimately run away with the vessel, sell her, and embezzle the proceeds. *Thurston v. The Columbian Ins. Co., 3 Caines' Rep. 89.*

35. If the owner of a vessel charters her for a voyage, and still himself retains the management of her, hiring and paying the master and crew, and furnishing them with provisions, the *hirer* is not the owner of the vessel *pro hac vice*, but the original ownership still continues; consequently, if the master at the request of the hirer, goes out of the course of the voyage, it is barratry, for which the insurers on the vessel are liable. *McIntyre v. Bowne, 1 Johns. Rep. 229.*

36. If the owner of a vessel charters her to the master for a certain length of time, the master covenanting to victual and man her at his own cost, he is to be deemed owner *pro hac vice*, and no act

of his will amount to barratry. *Hallett v. The Columbian Ins. Co.*, 8 Johns. Rep. 272.

37. And if he commits an act, which, in case he were invested with no other character than that of master would be barratry, the insurer will not be liable even to an innocent owner of goods laden on board of the vessel. *Ibid.*

#### 5. BY AVERAGE CONTRIBUTIONS.

38. A jettison of goods laden on deck, at half freight, although they are expressly mentioned in the policy, cannot be brought into general average. *Lenox v. The United Ins. Co.*, 3 Johns. Cases, 178. *Smith v. Wright*, 1 Caines' Rep. 43. *Note*.—The reason why goods laden on deck cannot claim either contribution or general average, in case they are ejected, is that they of themselves increase the danger of the navigation, and are taken on board under an implied agreement that they shall be first sacrificed, if it becomes necessary to eject.

39. But it is otherwise as respects the ship's boat, that being a necessary part of the ship's furniture. *Lenox v. The United Ins. Co.*, 3 Johns. Cases, 178.

40. A damage to particular memorandum articles which arises necessarily from some act done for the general safety of the ship and her cargo, is a subject of general average. The articles being damaged by an act done for the common benefit, must be considered as sacrificed for the same

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purpose. *Maggrath v. Church*, 1 *Caines' Rep.* 196.

41. The wages and provisions of the crew, during the detention of a vessel captured and carried in for adjudication, may be brought into general average. *Leavenworth v. Delafield*, 1 *Caines' Rep.* 573. *See post*, 57.

42. If a vessel is captured while prosecuting her voyage, in settling the proportion of average, the freight will be chargeable for contribution up to the day of the capture. *Ibid.* *See post*, 58.

43. In cases of capture, the rule by which a general average is to be calculated is, the goods at their first cost or invoice price, and charges at the port of departure; the vessel at four fifths of her actual value at the same place, reckoning nothing for provisions or wages paid in advance; and the freight at one half of the gross sum agreed to be paid. *Ibid.* *See post*, 61.

44. If a vessel is obliged, from sea-damage, to bear away to a port of necessity to refit, the wages and provisions for the crew, &c., from the moment of her thus bearing away to the period of her re-sailing on her original voyage, constitute a subject for general average. *Waldens v. Le Roys*, 2 *Caines' Rep.* 263. *Henshaw v. The Marine Ins. Co.* *Ib.* 264.

45. The expenses incident to the detention of a vessel chartered at so much per month, by reason of an embargo, are not a subject of general average. *Penny v. The New-York Ins. Co.*, 3 *Caines' Rep.* 155.

46. Where a vessel was captured with her cargo, and proceedings were instituted in the Admiralty Court against the whole cargo, and part of it was condemned and the residue was released. To prevent an appeal and avoid further detention, the master agreed to pay a specified sum for a ransom, and sold part of the cargo, being more than a moiety of the part insured, to defray the expenses and pay the ransom ; *It was held*, that the sum paid for ransom and expenses was not general average, but was to be borne by the cargo alone ; and that the plaintiff was entitled to recover for a total loss. *Vandenheuvel v. The United Ins. Co.*, 1 *Johns. Rep.* 406. *See APPENDIX*, 185.

47. Where the vessel insured has been captured and condemned, but the cargo is liberated, the expenses incurred in endeavoring to recover her are to be apportioned as general average and borne by the vessel, freight and cargo. But the insured on the vessel can recover only the proportion chargeable to the vessel. *Jumel v. The Marine Ins. Co.*, 7 *Johns. Rep.* 412.

48. Where a vessel is compelled to put into an intermediate port to refit, the wages and provisions of the crew, the expenses of unloading, repairing, re-loading, storage, &c., from the time of the accident until she is again ready to sail, are items for general average. And if, by an embargo, or detention of the subject insured, after these expenses have been incurred, there is a total loss, they must be paid by the insurer *in addition* to the

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total loss. *Barker v. The Phænix Ins. Co.*, 8 Johns. Rep. 307.

49. Where a vessel was stranded near her port of delivery, and it was agreed by the insurers and insured, that without prejudice to their respective rights, lighters and men should be sent to endeavor to save the property, and the cargo was thereby preserved and delivered to the consignees and owners, but the vessel was totally lost; *It was held*, that the expenses of salvage, including the costs of lighters, &c., were general average, and that the insurers on the cargo were bound to pay their proportion of such average. *Heyliger v. The New-York Firemen Ins. Co.*, 11 Johns. Rep. 85.

50. If a vessel arrives at her outward port of destination after having been injured on her voyage by tempests, and there delivers her cargo and earns freight, and is afterwards detained for the purpose of receiving necessary repairs, the wages of the master and crew, and the expense of provisions on board during such detention, are not general average, and the underwriters on the ship are not liable for them. *Dunham v. The Commercial Ins. Co.*, 11 Johns. Rep. 315.

51. Only such expenses can be brought into general average as were incurred previously to the arrival of the vessel at her port of destination or discharge, and as were necessary for the prosecution of the voyage, and the preservation of the cargo and freight, as well as the vessel. *Ibid.*

52. The same rule as to contribution applies as well between the insurer and the insured, as the

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owners of the ship and the cargo. Per *Van Ness, J. Strong v. The Firemen Ins. Co.*, 11 Johns. Rep. 323.

53. An insurance was effected on *freight*. The vessel was compelled to put into a port of necessity, where the cargo, on being taken out in order that the vessel might be repaired, was found to be greatly injured, and not in a state to be re-shipped, and was consequently sold. The vessel was repaired so as to be able to prosecute her voyage ; *It was held*, that the insured could not recover for a loss of freight, as the subject, though damaged still remained *in specie*. *Saltus v. The Ocean Ins. Co.*, 14 Johns. Rep. 138.

54. Insurance was effected on a cargo of flour and corn. A part of the cargo was thrown overboard in a storm, for the preservation of the ship and lading. The vessel having put into a port of necessity, the residue of the cargo was found to be unfit to be re-shipped, and was therefore sold ; *It was held*, that the insured was entitled to contribution for the corn thrown overboard, but that the insurers were protected by the *memorandum* from any loss on what remained *in specie*, although it was reduced by sea-damage to less than half its value. *Ibid.*

55. Where a ship is voluntarily run ashore in case of extremity, and is afterwards recovered and performs her voyage, the damages resulting from the stranding are to be borne as general average. *Bradhurst v. The Columbian Ins. Co.*, 9 Johns. Rep. 9.

56. If the ship is destroyed and totally lost, by the act of running her ashore, but the cargo is saved, this will not be a case of general average, and the cargo will not be bound to contribute. *Ibid.*

57. The wages of the crew, during a detention by an embargo, are not chargeable to the ship, nor are they general average, but fall exclusively on the freight. *McBride v. The Marine Ins. Co.*, 7 *Johns. Rep.* 431. *See ante*, 41.

58. In adjusting average, the freight actually earned will form the rule for contribution; and not what the vessel might have earned had she arrived at her port of destination. *Magrath v. Church*, 1 *Caines' Rep.* 196. *See APPENDIX*, 150.

59. The whole contribution is recoverable in the first instance from the insurer. *Ibid.*

60. Except, where the ship, freight, and cargo, all belong to the same person, and the freight and cargo are not insured. In such case the insured on the vessel can recover only the proportion of average chargeable to the vessel. *Jumel v. The Marine Ins. Co.*, 7 *Johns. Rep.* 412.

61. Where a vessel has become so much injured by the perils of the sea as to make it necessary to sell her in a foreign port, the amount of her value on which the general average is to be calculated, is the amount she actually and *bona fide* sold for, and not four-fifths of her original value, as in case of capture. *Bell v. Smith*, 2 *Johns. Rep.* 98. *See ante*, 43.

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62. In a question of average, Mobile is to be considered a foreign port in relation to New-York. *Lewis v. Williams*, 1 *Hall's Superior Court Rep.* 430.

*See ABANDONMET*, 41. **MEMORANDUM**, 5, 7.

#### 6. BY DEATH OF ANIMALS.

63. Where horses were insured "against all risks, including the risk of death from any cause whatever, until they shall be safely landed." And in consequence of a storm during the voyage, one of them fell and was so much injured as to occasion his death, three days after he was landed at the port of destination. *It was held*, to be within the risk insured against, and that the insurers were liable for his full value. *Coit v. Smith*, 3 *Johns. Cases*, 16.

63<sup>a</sup>. If the horse had continued to live after the injury received, the insured would have been entitled to claim indemnity in proportion as his value was lessened by the accident. *Ibid.*

#### 7. ON PROFITS.

64. A policy on profits is a valid policy, provided the insured has an interest in the subject matter whence the profits are to arise, and a loss under such policy will be either total or partial, according as the loss on the subject matter out of which they are to be derived is total or partial. *Abbot v. Sebor*, 3 *Johns. Cases*, 39. *See APPENDIX*, 356.

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65. *It seems*, that the rule by which to ascertain whether there is a total or a partial loss of the profits, is to determine whether more or less than one-half in value of the subject whence they are to arise has been lost. *Ibid.*

66. Where goods are insured in one policy, and the profits on a separate policy, and the insured recovers for an average loss on the goods, he can recover only an average loss in like proportion on the profits. *Loomis v. Shaw, 2 Johns. Cases, 36.*

*Vide ABANDONMENT, 48, 89. PREMIUM, 14. APPENDIX, 356.*

### 8. ON COMMISSIONS.

67. A supercargo was to receive as his commissions a gross sum out of the proceeds of the return cargo, or a part of the cargo to that amount, on its arrival at the place where the voyage was to terminate. On her return voyage the vessel was compelled to put into a port of necessity, where the voyage was broken up, and the vessel and cargo sold; *It was held*, that the supercargo could not demand his compensation from his employers, but inasmuch as it was an insurable interest, and an insurance had been effected, there being a total loss, he might recover the whole from the underwriters. *Robinson v. The New-York Ins. Co., 2 Caines' Rep 357. In Error. 1 Johns. Rep. 616. See Robinson v. The United Ins. Co., 3 Johns. Cases, 39. See ADJUSTMENT, 15. WARRANTY, 29.*

**MARINE INSURANCE.—*See POLICY.*****MARITIME LOANS.**

“THE contracts of bottomry and respondentia,” says Kent, “are maritime loans of a very high and privileged nature, and are always upheld by the Admiralty with a strong hand, when entered into *bona fide*, and without any suspicion of fraud. The principle upon which they are founded and supported is of great antiquity, and penetrates so deeply into it, that Emerigon says it cannot be traced. It was borrowed by the Romans from the laws of the ancient Rhodians, and it is deeply radicated in the general maritime law of Europe, from which it has been transplanted into the law of this country.” These contracts seem to have originated in the power given to the master of a vessel to hypothecate the ship and goods for necessaries, in a foreign country. It is essential, to justify the making of the contract, that the ship should be abroad, and in a state of actual necessity, and that there are no other resources from whence the master or owner can derive the requisite supplies. These loans are allowed and favored on the principle that the lender runs the hazard of losing both his principal and interest, and because they tend greatly to the promotion

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and growth of commercial enterprise. And on these accounts it is not considered usury to demand, or to receive, more than the legal rate of interest. *Marshall on Insurance. Park on Insurance. Jacob's Law Dictionary. Kent's Commentaries*, vol. 3. *See BOTTOMRY. RESPONDENTIA.*

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MARINE INTEREST.—*See BOTTOMRY. ABANDONMENT*, 79, 80.

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### MASTER.

THE character and ability of the *master*, are material subjects of consideration in forming an estimate of the risk in making the contract of insurance, and his name should always be specified in the policy. In France and Holland it is provided by a positive law that this shall be done. No such enactment exists in England, or in this country. Yet if the master is named in the policy, and it contains no clause which gives the insured permission to employ any other in his place, it becomes a part of the contract that no other person shall be employed as master. *Marshall on Insurance. Kent's Com.*, vol. 3. *See CONCEALMENT*, 10.

1. Where a ship becomes disabled it is the duty of the master to procure another vessel, and to forward the cargo to its place of destination, if it is in his power to do so ; that is, if he can obtain a vessel in the same port, or in a contiguous one. But where resort must be had to distant places, and, independent of procuring a vessel, there are further serious impediments in the way of putting the cargo on board, the rule is not obligatory. *Treadwell v. The Union Ins. Co.*, 6 Cowen's Rep. 270. *Saltus v. The Ocean Ins. Co.*, 12 Johns. Rep. 107.

2. If he neglects to do so, the insurer is not answerable, and the insured on freight cannot recover, unless such neglect is caused by an act of barratry. *Ibid. Center v. The American Ins. Co. of New-York*, 7 Cowen's Rep. 564. *Bradhurst v. The Columbian Ins. Co.*, 9 Johns. Rep. 17.

3. Where a vessel is not injured to the extent of a moiety of her value, it is the duty of the master to make her sea-worthy, and to proceed on the voyage ; and if the insured completes the repairs afterwards, the underwriter must pay the additional expense, so as to furnish a complete indemnity. *The American Ins. Co. v. Center*, 4 Wendell's Rep. 45.

4. The master is not authorized to sell the ship or cargo, except in a case of absolute necessity, when he is not in a situation to consult with his owner, and when the preservation of the property

makes it necessary for him to act as the agent of whom it may concern. *Ibid.*

5. If the master, in the exercise of his legitimate duties as the agent of whom it may concern, has converted a total into a partial loss before an abandonment, the fact that the loss is no longer total takes away the right to abandon. *Dickey v. The American Ins. Co.*, 3 *Wendell's Rep.* 658. See **ABANDONMENT**, 60.

6. Where an abandonment of a vessel is made while the loss continues total, all the intermediate acts of the master are the acts of the underwriters, but if the property is restored before an abandonment is made, the right to abandon is gone, and the acts of the master will be considered the acts of the insured. *Ibid.*

7. Where a vessel is improperly seized under pretence of carrying on an illicit trade, it is the duty of the master to appear and put in a claim on behalf of the insured. *Francis v. The Ocean Ins. Co.*, 6 *Cowen's Rep.* 404.

8. Where there was an insurance on goods. The vessel was captured by a French privateer, carried in, and proceeded against under the Berlin and Milan decrees. The master was advised by counsel, by the American Consul General and agent of prizes, and by the American Minister, that the property would certainly be condemned, and that he ought to attempt a compromise with the captors. He accordingly, being also part owner of the ship, compromised both for the ship and cargo.

The parties to the policy of insurance had not originally authorized, or since sanctioned, the act of the master ; *It was held*, that he was *ex necessitate* the mutual agent of both parties, to do what was right, and that his acts done in good faith, and for the benefit of all concerned, could not prejudice the rights of either the insurers or the insured. *Clarkson v. The Phœnix Ins. Co.*, 9 *Johns. Rep.* 1. *See DEVIATION*, 9, note.

9. The mode, nature, and value of such a compromise are not material, the only question which can arise is as to the fact whether the acts of the master were done in good faith. *Ibid.*

10. Yet where the master is himself also part owner of the subject insured, his interest under the policy will be affected in a different way from that of the other owners. *Waddell v. The Columbian Ins. Co.*, 10 *Johns. Rep.* 61.

*See ABANDONMENT*, 59, 60, 61, 62, 77, 79, 81, 82, 101, 105. *ADJUSTMENT*, 18. *LOSS BY BARRATRY*. *PREMIUM*, 15. *SHIP*, 21, 22, 23, 25. *SUPERCARGO*, 2, 3, 5. *APPENDIX*, 124, 199, 227, 230, 353, 354.

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### MEMORANDUM.

ORIGINALLY underwriters were held liable under the words of the policy for any partial loss individually sustained by the subject of the insurance. To abridge this liability, and to confine or limit insurances to that which is their only object, an

indemnity against real and important losses, as well as to avoid the frequent controversies concerning losses growing out of the perishable nature of the goods, a clause was introduced into policies called the *memorandum*. It is usually preceded by an enumeration of the articles intended to be affected by it, and declares that these, as well as all others which are perishable in their own nature, under a given rate per cent, are "*warranted free from average, unless general, or the ship be stranded.*" *Park on Insurance.* *Marshall on Insurance.* *Kent's Com.* vol. 3. The following cases will elucidate the design of this clause, as well as the construction given to its operation in our own courts :

1. A memorandum that "corn, &c., shall be free from average unless general," protects the insurer from all claim for a total loss, when there has not been an actual physical destruction of the subject insured. The clause appears to have been introduced in the year 1749, and the *English* decisions upon it recognize a usage conformable to this construction, coeval with its introduction. *Le Roy v. Gouverneur*, 1 *Johns. Cases*, 226. *Magrath v. Church*, 1 *Caines' Rep.* 196. *Neilson v. The Columbian Ins. Co.*, 3 *Caines' Rep.* 108.

2. Where the policy contained a memorandum that salt, &c., "and all articles that are perishable in their own nature are warranted by the assured free from average unless general ; and sugar, &c., skins, hides and tobacco, are warranted

free from average under 7 per cent. unless general ;" *It was held*, that the articles enumerated in the second clause of the memorandum were not to be considered as intended to come under the general words in the first clause, and that the insurer could recover a partial loss on them, if it exceeded 7 per cent. *Bakewell v. The United Ins. Co.*, 2 Johns. Cases, 246. See APPENDIX, 194.

3. Where a memorandum enumerated *dried fish* among the articles free from average unless general, and also "all other articles perishable in their own nature ;" *It was held*, that *pickled fish* were not to be considered as included in the memorandum, and that the plaintiff was consequently entitled to recover an average loss on them. *Baker v. Ludlow*, 2 Johns. Cases, 289.

4. The meaning of the clause, "all other articles perishable in their own nature," in the memorandum of a policy of insurance, extends to those articles not particularly enumerated, which are liable of themselves to perish in the course of the voyage, without any external injury. *Astor v. The Union Ins. Co.*, 7 Cowen's Rep. 202.

5. An insurance was effected on goods, which were specified in the margin of the policy, which contained a written memorandum that "the insurers by this policy take no other risk than general average, and such total loss as may arise by the absolute destruction of the property." The vessel having stranded, part of the goods were afterwards lost or stolen. The invoice cost of the

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articles insured amounted to \$1195, and the amount of articles stolen or lost was \$332; *It was held*, that the policy was on so much of the cargo as an integral subject, and that the insured could not recover for each article totally lost, inasmuch as there was neither a general average, nor a total destruction of the subject insured. *Guerlain v. The Columbian Ins. Co.*, 7 *Johns. Rep.* 527.

6. To render the underwriters liable under a memorandum which warrants the subject insured free from average unless general, the loss, if from sea-damage, must be in fact total. *Astor v. The Union Ins. Co.*, 7 *Cowen's Rep.* 202. *See ante*, 1.

7. Except for general average, the underwriter is not answerable for a partial loss on memorandum articles, unless there is a *total loss of the whole* of the particular species, whether the article specified be shipped in bulk, or in separate boxes, or packages. *Wadsworth v. The Pacific Ins. Co.*, 4 *Wendell's Rep.* 33. *See ABANDONMENT*, 21.

8. And where the exception in the memorandum clause is broad enough to include other losses besides those arising from the inherent decay of the articles specified, the insurer is entitled to exemption from every risk plainly and explicitly included within the terms of the exception. *Ibid.*

9. In the year 1796 a cargo of goods was insured from *Salem to Europe*, and from thence to the East Indies, and back to the United States, with liberty to touch, stay, and trade, at any port or place on the outward and homeward passages,

&c. The ship sailed to Bordeaux, and from thence in succession to the Isle of France, Tranquebar, Pondicherry, and Madras, from whence she returned again to Pondicherry and sailed thence to the Isle of France, and from thence in 1797 back to Calcutta, and from thence home. By a memorandum, written by the insurers in the margin of the policy in March, 1798, it was agreed for an additional premium of 10 per cent. paid by the insured (the ship having returned to the Isle of France from Calcutta, and sailed again to the coast of India,) that the same should not prejudice the insured ; *It was held*, that this memorandum was an agreement by the insurer, and not a warranty by the insured, and that it covered all previous deviations, and resumed the risk from the Isle of France back to the East Indies. *Crowningshield et al. v. The New-York Ins. Co., 3 Johns. Cases, 142.* See ABANDONMENT, 21. PREMIUM, 6. Loss, 54. POLICY, 26. APPENDIX, 95, 96, 97, 152, 258, 259, 260.

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MISSING SHIP.—*See LOSS, 1, 2, 3.*

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MISREPRESENTATION.—*See REPRESENTATION.*

## NEUTRALITY.

**NEUTRAL** property, in the sense in which that expression is to be understood in policies of insurance, is property which belongs to the subject of a country in amity with the belligerent powers. *Park on Insurance. Marshall on Insurance.*

1. The transfer of an American vessel in trust to pay a debt due to the subject of a belligerent power destroys the neutrality of the property. *Murray v. The United Ins. Co., 2 Johns. Cases, 168.*

2. Sailing for a port understood to be blockaded *with the intention* to enter is a breach of neutrality and a violation of the warranty contained in a policy. *Vos & Graves v. The United Ins. Co., 2 Johns. Cases, 180. Contra, same case in Error, 2 Johns. Cases, 469. See WARRANTY OF NEUTRALITY.*

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## OPEN POLICY.

AN open policy is where the amount of the interest of the insured is not fixed in the policy, but is left to be afterwards ascertained by the insured, in case a loss should happen. *See POLICY. APPENDIX, 174, 195.*

## PARTIAL LOSS.

THE term *partial loss*, when applied to the ship, is understood to mean a damage she may have sustained, from any of the perils comprehended in the policy, while in the prosecution of her voyage. When applied to the cargo, it means such damage as the goods may have suffered from storms, &c., although the whole or the principal part of them may afterwards arrive at the port of destination. The term *average loss* is frequently used in policies of insurance to designate a particular partial loss, but it would be less ambiguous to call it a *partial* rather than an *average loss*. *See AVERAGE. ADJUSTMENT. Loss.*

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## PERILS OF THE SEA.

EVERY accident which is occasioned by the violence of winds or waves, by thunder and lightning, by driving against rocks, or by the stranding of the ship, may be considered as a peril of the sea. *Kent's Com. vol. 3. Quod fato contigit, et cuivis, quam ris diligentissimo, possit contingere. Marshall on Insurance.*

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PETTY AVERAGE.—*See AVERAGE.*

## POLICY.

*Marine insurance* is a contract whereby one party undertakes, for a stipulated sum, to secure to the other his interest in any vessel, or goods on board, or freight, against any loss which shall be occasioned by means of any of the perils or sea-risks to which it may be exposed during a certain voyage, or within a fixed period of time. The person who takes upon himself the risk is called THE INSURER, or, from the circumstance of his name being subscribed at the foot of the instrument, THE UNDERWRITER. The party whose interest is protected by the contract is called THE INSURED. The sum paid to the insurer, as the consideration for the contract, is called THE PREMIUM; and the instrument by which it is effected, and which expresses the terms of the agreement between the insurer and the insured, is called THE POLICY.

Policies are usually distinguished according to their nature, into *interest* and *wager-policies*, and as respects the amount or value of the interest of the insured, they are denominated *open* and *valued policies*. A *wager-policy* is usually expressed to be upon "interest or no interest," or "without further proof of interest than the policy," or without benefit of salvage to the insurer," and it embraces those cases where the insured does not think proper to disclose the nature of his interest, and

the insurer dispenses with the necessity of the insured having any interest in the cargo or the ship. The performance of the voyage in the usual time and manner, and not the mere existence of the ship or cargo, being usually the object of the insurance. It is a mere hope or expectation without any interest in the subject matter.

An *interest-policy*, is where the insured has a real, substantial, assignable interest in the thing insured. An *open policy* is where the amount of the interest of the insured is not fixed in the policy, but is left to be ascertained at the trial in case a loss should happen. A *valued policy*, is where the value of the ship or goods has been fixed and inserted in the policy, in the nature of liquidated damages, to save the necessity of proving it in case of a loss. *Park on Insurance.* *Marshall on Insurance.* *Kent's Com. rol. 3.*

In a work of this kind it is hardly necessary to say any thing of the importance, utility, and advantages of this contract in a commercial community. They are very well, though quaintly set forth in the *statute 43 Elizabeth, c. 12*, which recites that, “by means of policies of insurance it cometh to pass, upon the loss or perishing of any ship, there followeth not the undoing of any man ; but the loss lighteth rather easily upon many, than heavily upon a few ; and rather on those who adventure not, than on those who do adventure ; whereby all merchants, especially of the younger sort, are allured to venture more willingly and more freely.”

- I. PERSONS EFFECTING THE POLICY.**
- II. GENERAL CONSTRUCTION OF, WHEN VALUED OR OPEN.**
- III. DESCRIPTION OF THE OBJECT INSURED.**
- IV. DESCRIPTION OF THE VOYAGE IN THE POLICY.**
- V. ACTION UPON THE POLICY.**

- 1. PERSONS EFFECTING THE POLICY.**

In this country, all persons, whether aliens or natives, may be insured, with the exception of alien enemies. It is a contract authorized by the general law and usage of nations. As respects those who may become insurers, the rule of the common law prevails with us, and any individuals, or companies, or partnerships, may lawfully become insurers.

*Kent, vol. 3. See APPENDIX, 274.*

1. Where the policy states the insurance to be *for account of A. B.*, it is equivalent to a representation that he is the owner of the property, and that the insurance was effected for his benefit. *Kemble and Gouverneur v. Rhinelander, 3 Johns. Cases, 130.*

2. The underwriter, and not the broker who effects the insurance, is debtor to the insured for a loss, and an agreement as to the mode of payment made between the insurer and the broker, will not affect the insured unless he has assented to it. *Bethune v. Neilson, 2 Caines' Rep. 139.*

3. If one, of two joint-owners, causes an insurance to be effected for himself, and *every other person to whom the property doth, may, or shall*

*appertain in whole or in part*, it is an insurance on their joint account, and not for the sole and separate benefit of the one whose name appears in the policy. And in case a loss should occur, the party effecting the insurance is entitled to recover and receive only a moiety of the sum for which the underwriter is liable. *Lawrence v. Sebor*, 2 *Caines' Rep.* 203.

4. Where a policy of insurance is effected *in behalf, or on account of the owner* of a cargo, no one but the owners can maintain an action upon it. Where it is entered into *for whom it may concern* the action may be sustained by any one, although having but a special interest in the cargo, as by lien, respondentia, or otherwise. In either case, however, it must appear that the policy was obtained in behalf of the person claiming a right to recover under it. *The Pacific Ins. Co. v. Cattell*, 4 *Wendell's Rep.* 75.

5. So that one whose interest was not intended to be insured cannot claim the benefit of an insurance effected by others, even although by the terms of the policy his interest would seem to be included. *Ibid.*

6. A part-owner may insure his individual interest in a vessel without specifying that interest, it is sufficient if he had an insurable interest to the amount in question. *Turner v. Burrows*, 5 *Wendell's Rep.* 541. See APPENDIX, 169.

7. If it clearly appears that the owner who effected the insurance did it on joint account, and

the language of the policy is *for account of whom it may concern*, or *for account of the owners*, any one having an interest in the vessel insured may claim the benefit of the policy. But where it contains no words importing an interest in any one other than the person effecting it, none but such person can claim the benefit of it. *Ibid.*

8. Extrinsic evidence is admissible to show who were the persons intended to be embraced in a policy of insurance effected *on account of the owners*, without a further designation of the persons intended to be insured. And two out of three owners who cause an insurance to be effected for their separate benefit, may maintain an action in their own names on the policy, without joining the other owner as plaintiff. *Catlet v. The Pacific Ins. Co.*, 1 *Wendell's Rep.* 561. See APPENDIX, 155.

9. Where a policy is executed in blank, thus : “ — by the Niagara Ins. Co., — S. E. B., on account of — do make insurance, and cause — to be insured, lost or not lost, upon the body, tackle, &c., of the good American brig, called —, &c. ;” *It seems*, that the policy may be filled up by the holders, with the names of the persons intended to be insured, or with the words *whom it may concern*, and extrinsic evidence will be admitted to show who are the persons intended to be insured. *Turner v. Burrows*, 8 *Wendell's Rep.* 144.

10. *It seems*, that an insurance effected by a

joint owner upon the interest of his co-owner in a vessel, although the same is done without authority, if it is subsequently ratified by the party to be benefitted by it, may be enforced against the insurer. But if such insurance of the vessel was coupled with an insurance on the freight and cargo also, and the party effecting it intended the whole to be a joint adventure, he is not liable to his co-owner for his proportion of the monies obtained from the insurer, on the loss of the vessel, unless the co-owner consents to participate with him in the whole transaction. *Ibid.*

11. Where the agent for the proprietors of a steamboat effected an insurance on the boat for the benefit and on account of *whomsoever it might concern at the time of the loss, if any should occur*; *It was held*, that a mortgagee of the interest of one who was an owner at the time of the insurance, and for whose benefit the policy was underwritten, had a right to the mortgager's portion of the insurance money, to the extent of the debt secured by the mortgage. *Rogers v. The Trader's Ins. Co.*, 6 *Paige's Chancery Rep.* 583.

12. If the insurer knows that a policy, though in the name of a broker, is effected in fact on account of another, a set-off of a debt due from the broker, cannot be made against a suit by the broker, on that policy, though the suit is carried on in his own name. *Gordon v. Church*, 2 *Caines' Rep.* 299. *See APPENDIX*, 4, 10, 12, 91, 122, 123, 132, 133, 156, 157, 215, 217, 274.

**2. GENERAL CONSTRUCTION OF THE POLICY, WHEN  
VALUED OR OPEN.**

13. The terms used in a policy of insurance are to be construed in that sense which the known usages of trade, or the use and practice as between assurers and the assured, have given to them. *Coit v. The Commercial Ins. Co.*, 7 Johns. Rep. 385. *See APPENDIX*, 39, 41, 42, 249.

14. The contract of the underwriters on a policy of insurance is one of indemnity merely. *Byrnes v. The National Ins. Co.*, 1 Cowen's Rep. 265. *See APPENDIX*, 29, 337.

15. And, being a contract of indemnity, it must receive such a construction of the words used in it as will make the protection it affords co-extensive if possible with the risk of the insured; but at the same time a just regard must be paid to the language of the parties, and no strained or unnatural sense must be ascribed to it, to the prejudice of either party, unless from necessity. *Dow v. The Hope Ins. Co.*, 1 Hall's Superior Court Rep. 166. *See APPENDIX*, 29, 191.

16. Where the language made use of in a policy of insurance was, *the said goods and merchandise are valued at 18 francs, valued at \$4 44*; *It was held*, that those words were intended only to ascertain at what rate the value of the cargo paid for in francs, was to be reduced into the currency of this country. And that this was an open policy. *Ogden v. The Columbian Ins. Co.*, 10 Johns. Rep. 273.

17. Where one-fourth of a vessel was insured, and the vessel *thereby insured* was valued at \$5,500 ; *It was held*, that this valuation applied to the interest insured, and not to the whole ship. *Post v. The Phænix Ins. Co.*, 10 Johns. Rep. 79.

18. Where there was a clause in the policy providing that the insurers were to take no risk in port but sea-risk ; *It was held*, that the term *port* was used in contradistinction to *the high seas*, and that the clause was referable to any port into which the vessel might of necessity enter during her voyage. *Patrick v. The Commercial Ins. Co.*, 11 Johns. Rep. 9.

19. During the late war with Great Britain, an insurance was effected on goods from Norfolk to Lisbon. The policy contained a warranty that the vessel should have a genuine British license on board. The vessel sailed on her voyage, having such a license on board at the time of her loss ; *It was held*, that inasmuch as the taking of such a license was unlawful, and subjected her to forfeiture, the policy was void. *Colquhoun v. The New-York Firemen's Ins. Co.*, 15 Johns. Rep. 352.

20. If a war breaks out between the country to which the property insured belongs and a foreign country, after the commencement of the voyage insured, it will not have the effect to vacate the policy, and the insurers are liable for a loss which may arise out of the state of the war. *Saltus v. The United Ins. Co.*, 15 Johns. Rep. 523.

21. The term *port*, which in its general accep-

tation means a harbor or shelter to vessels from storms, &c., when applied to places on a coast where there are no harbors, may mean only a road, or anchorage place for the purposes of loading or unloading cargoes. *De Longuemere v. The New-York Fire Ins. Co.*, 10 *Johns. Rep.* 120. *De Longuemere v. The Firemen's Ins. Co.*, 10 *Johns. Rep.* 126.

22. Every policy on profits is necessarily a valued policy. *Mumford v. Hallett*, 1 *Johns. Rep.* 433.

23. The contract in a valued policy is to pay the insured the whole valuation if the subject of the insurance is lost; and the valuation contained in the policy, is conclusive upon the underwriters. It is the amount which the insured is entitled to recover, unless there has been fraud or imposition practiced in fixing the value. *Whitney v. The American Ins. Co.*, 3 *Cowen's Rep.* 210. *In Error*, 5 *Cowen's Rep.* 712. *Davy v. Hallett*, 2 *Caines' Rep.* 16. See APPENDIX, 234, 235.

24. An insurance by a valued policy, on a cargo out and *return* home, embraces goods purchased by an hypothecation of the outward cargo to its full value. *The American Ins. Co. v. Whitney*, 5 *Cowen's Rep.* 712.

25. The provision in a policy that the risk is *against total loss only*, means an absolute, not a mere technical total loss. And this is the case whether the policy is a wager policy or otherwise. *Buchanan v. The Ocean Ins. Co.*, 6 *Cowen's Rep.* 318.

26. A policy was effected on *fur*. The title of the invoice was *furs*; under which were specified bear and raccoon skins, opossum, deer, fine-fisher, cross-fox, martin, wild-cat, wolf, wolverine, panther, and cub skins. The *memorandum* warranted *skins and hides, and all other articles perishable in their own nature, free from average unless general*. The articles in the invoice were deteriorated by sea-damage to more than half their value, and the insured abandoned. In an action on the policy; *It was held* competent for the plaintiff to show that the term *fur*, covered the *skins* in the invoice; and that the terms *hides and skins* in the *memorandum*, did not in mercantile usage include them. And also that they were not articles perishable in their own nature within the acceptation of those words in the *memorandum*. The jury on the conflicting evidence to these points, having brought in a verdict for the plaintiff, though contrary to the charge of the circuit judge, the Supreme Court refused to set this verdict aside. *Astor v. The United Ins. Co.*, 7 *Cowen's Rep.* 202.

27. The owners of five-sixths of a cargo of specie which amounted to \$90,000, effected an insurance on their interest in the same to the extent of \$30,000, and a loss occurred; *It was held*, that this was an open policy, and that the insured were entitled to recover the whole sum insured, and not merely five-sixths thereof; they having proved that they were owners and had an interest in the cargo to that extent. *The Pacific Ins. Co. v. Catlett and Keith*, 4 *Wendell's Rep.* 75.

28. Where goods are shipped for a voyage, and an insurance is effected *on the goods out and upon the proceeds thereof home*, and the *identical goods* composing the outward cargo are brought home in the return voyage, they are not to be considered as within the meaning of the words *proceeds home* contained in the policy, nor will they be covered by it. *Dow v. The Hope Ins. Co.*, 1 *Hall's Superior Court Rep.* 166.

This case was taken by appeal before the Supreme Court of this state, and thence to the Court of Errors, where the same construction was sustained. *Dow v. Whetton*, 8 *Wendell's Rep.* 160.

29. In such a case, however, the words must receive a liberal construction. It is not necessary that the *return cargo* should be procured by an *actual sale* of the outward cargo and the appropriation of the money arising from such a sale; It is sufficient if the homeward cargo is a *substitute* for the outward, and springs from it, though indirectly, from the disposal of it either by sale or deposit. Or if it is procured by an hypothecation of the outward cargo to its full value. *Ibid. The American Ins. Co. v. Whitney*, 5 *Cowen's Rep.* 712.

30. The phrase *return cargo* must be construed to mean a cargo for the home port, unless it is otherwise explained. *Fontaine v. The Phœnix Ins. Co.*, 11 *Johns. Rep.* 293.

31. Underwriters are bound to know the mercantile usage of the words by which they insure

and are liable according to that meaning. *Astor v. The Union Ins. Co.*, 7 Cowen's Rep. 202. See APPENDIX, 164, 168, 247, 329.

32. Under a policy of insurance against *loss by thieves*, the underwriters are liable for a loss by thieves who are in no way connected with the ship, whether it is by simple larceny or by other violence, and although the master and ship-owners may be also liable as common carriers for the loss. *The Atlantic Ins. Co. v. Storrow*, 5 Paige's Chancery Rep. 285. *The Same v. The Same*, 1 Edwards' Chancery Rep. 621.

33. Although the master and ship-owners may also be liable to the insured for the loss thus sustained, they cannot equitably claim contribution from the underwriters to make good their loss. And in case the insured should receive satisfaction from them, he cannot legally assign the policy to them for their benefit, so as to enable them to recover from the underwriters. *Ibid.*

34. But if the insured should abandon for a total loss, and the insurer pays the amount of such loss, he is entitled in equity to succeed to the rights of the insured as against the master and owners. And if the insured cancels the bill of lading, or discharges his claim against the master or ship-owners for the loss, after he has obtained judgment against the underwriter, the Court of Chancery will relieve the underwriter *pro tanto*. *Ibid. The Same v. The Same*, 1 Edwards' Chancery Rep. 621.

35. Whether the insurer under such a policy would be liable for simple larceny committed by persons belonging to the ship. *Quere?* *Ibid.* See APPENDIX, 13, 14, 15, 32, 33, 35, 37, 38, 39, 41, 42, 64, 70, 71, 92 114 115, 129, 159, 187.

### 3. DESCRIPTION OF THE SUBJECT INSURED.

36. Profits, freight, and bottomry interest, must be insured *eo nomine*. *Abbot v. Sebor*, 3 *Johns. Cases*, 39. *Tom v. Smith*, 3 *Caines' Rep.* 245.

37. Goods laden on deck are not protected by a policy on goods or cargo, unless they are expressly mentioned. *Lenox v. The United Ins. Co.*, 3 *Johns. Cases*, 178.

38. In a policy on *freight*, supposed to be valued, the sum insured cannot be assumed as a valuation of the freight, nor adopted as conclusive evidence of the amount of the charterer's interest. *It seems* that the rule by which that interest is to be ascertained is the actual freight which the vessel did or could carry. *Mellen & Nesmith v. The National Ins. Co.*, 1 *Hall's Superior Court Rep.* 452.

38<sup>a</sup>. If goods laden on deck are expressly mentioned in the policy, yet in case they are thrown overboard to relieve the vessel in a storm and for the preservation of the ship and cargo, they are not to be brought into general average. *Lenox v. The United Ins. Co.*, 3 *Johns. Cases*, 178. See PREMIUM, 14. APPENDIX, 35, 166, 327.

**4. DESCRIPTION OF THE VOYAGE IN THE POLICY.**

39. An insurance was effected upon a cargo *from New-York to St. Andero in Spain*. At the time of procuring the policy, the insured represented that the voyage was to St. Andero, but that the vessel would have a clearance to Hamburg. The cargo was shipped for Hamburg, and while prosecuting the voyage thither the master was induced to put into St. Andero in order to avoid the perils of the sea. On his way there the vessel was captured; *It was held*, that the vessel sailed on a voyage for Hamburg, and not for St. Andero, and that consequently the policy never attached. *Forbes v. Church*, 3 Johns. Cases, 159.

40. Where a vessel was insured to *A.* but cleared for *B.*, and after a loss had occurred the master in his protest stated that she was bound to *B.*; *It was held*, that where it is proved that the vessel actually proceeded on her voyage to *A.*, the insertion of *B.* in the papers, when explained, will not make it a different voyage. *Talcott v. The Marine Ins. Co.*, 2 Johns. Rep. 130. See APPENDIX, 127, 128.

41. Where an insurance was effected *from A. to B. and at and from B. to C.*, and the vessel was driven into a port of necessity, and sailed thence directly to *C.* without touching at *B.*; *It was held*, that the voyage insured was to any or to all of the places named. And that the insured was not bound to go to all, but might proceed directly to any one of the ports mentioned; yet in case he

proceeds to more than one of them, the order stated in the policy must be observed. *Kane v. The Commercial Ins. Co.*, 2 Johns. Rep. 264.

42. But where a vessel on her homeward voyage was insured *from A. to B. with liberty to touch at C., beginning the adventure at and from A.*, and she never went to *A.* but proceeded to *B.*, and commenced her voyage homeward from thence; *It was held*, that this voyage was not the same as that described in the policy. *Murray v. The Columbian Ins. Co.*, 4 Johns. Rep. 443. See APPENDIX, 41.

43. An insurance was effected on goods *at and from any port or ports in the West Indies, and at and from thence to New-York, beginning the adventure on the said goods from the loading them on board in the West Indies.* The vessel having disposed of a small part of her outward cargo at one port in the West Indies, proceeded to another in order to dispose of the residue, and on her way thither she was captured; *It was held*, that the policy took effect from the time of her leaving the first port in the West Indies, on the cargo which she then had on board, although it was the same cargo which she carried out, such appearing to have been the intention of the parties; (the broker effecting the insurance having mentioned to the underwriters at the time they subscribed the policy, that the property to be insured was the same which was carried out,) and that the insurance was to commence *at farthest* on the vessel's quitting the

first port which she reached in the West Indies, after the subscription of the policy. *Vredenburgh v. Gracie*, 4 *Johns. Rep.* 444 n. See APPENDIX, 63, 64, 160, 192, 261.

### 5. ACTION UPON THE POLICY.

44. In actions on policies of insurance, the court will grant an order for the insured to produce to the insurer upon affidavit all papers and letters, or true copies thereof, which relate to the matters in issue between the parties. *Lawrence v. The Ocean Ins. Co.*, 11 *Johns. Rep.* 245, n.

45. And if such letters and papers are produced at the trial by the insurers, the insured will be entitled to have the whole read, it being analogous to a bill in chancery when given in evidence in a court of law. *Ibid.*, 241.

46. In an action upon a policy by one of two joint-owners, who has insured the whole, the plaintiff can recover only according to his proportion of interest in the subject of the insurance. *Murray v. The Columbian Ins. Co.*, 11 *Johns. Rep.* 302.

47. But under a general averment of interest in the entire thing, he may recover according to the quantum of interest which he proves at the trial. *Ibid.* APPENDIX, 153, 154, 175.

48. An insurance was effected on goods consisting of 137 whole, and 48 half pipes of wine, which were valued at \$14,000, and on the *returns* of the goods, on a voyage out and home. In the course of the voyage round, the goods were deli-

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vered to L. upon an advance of \$7000 and his receipt promising to answer drafts on behalf of the assured to any amount not exceeding \$3000 more. The goods were to be sold by L. for his reimbursement, and the surplus proceeds were to be remitted to the assured. The \$7000 were invested in a *return cargo*, together with \$1621, for which the insured drew on L., who answered the draft as he had agreed, making a clear investment of \$8469 85. The *return cargo* was lost by the perils insured against, and the outward cargo did not bring enough on actual sale to reimburse L. by \$4680 26, for which he drew on the insured. In an action on the policy, *it was held*, that the insured was entitled to recover as for a total loss, the full sum of \$14,000 and interest. *Whitney v. The American Ins. Co.*, 3 Cowen's Rep. 210.

49. But it would be otherwise if part only of the value of the goods had been invested in a *return cargo*. *Ibid.*

The judgment pronounced in this case was subsequently reviewed and affirmed in the Court of Errors. 5 Cowen's Rep. 712.

50. A contract of insurance made for the benefit of a third person without his knowledge or authority, is binding on the underwriter. And if it should be afterwards adopted by the party for whose benefit it was intended, he may enforce it. *Bridge v. The Niagara Ins. Co.*, 1 Hall's Superior Court Rep. 247.

51. As, where the plaintiff was a general agent

for a merchant residing at Carthagena, who was in the practice of making shipments to New-York ; and on the 19th of February, 1827, without any orders from his principal, he caused an open policy of insurance for \$5000 to be executed on account of his principal, *on goods laden, or to be laden, on board of any vessel from Carthagena to New-York.* The defendants subscribed the policy and received the premium. On the 17th of February the agent wrote to his principal informing him of his intention to effect such an insurance, and on the 23d of March following the principal replied to this letter and conditionally affirmed his act. On the 21st of February, two days after the policy was executed, a loss occurred by the perils insured against, on goods shipped by the principal on board of the brig *Mary from Carthagena to New-York;* *It was held,* that these goods were protected by the policy. That the defendants having contracted with the agent for the express benefit of the principal, and having received the premium, could not be allowed to show any want of authority in the agent ; and that the principal, having adopted the acts of the agent, could enforce the contract in the name of the agent. *Ibid.*

52. Where the agents of the proprietors of a steamboat effected an insurance upon the boat, *for the benefit and on account of whomsoever it might concern at the time of the loss if any should occur;* *It was held,* that a mortgagee of the interest of one who was an owner at the time of

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the insurance, and for whose benefit the policy was underwritten, had a right to the mortgagor's portion of the insurance monies, to the extent of the debt secured by the mortgage, *Rogers v. The Howard Ins. Co.*, 6 *Paige's Chancery Rep.* 583.

53. Where the agent of the original owner of property effects an insurance thereon, *for account of whomsoever it may concern at the time of the loss*, and by the terms of the policy the insurance money is made payable to such agent, in case of loss, if the insured assigns his interest in the property to a *bona fide* purchaser or mortgagee before any loss has occurred, the agent has no lien on the insurance money as against such assignee for a general balance due the assignor. *Ibid.*

54. A mortgagor of personal property who has mortgaged the same for its full value, is not a necessary party to a bill filed by the mortgagee against the underwriters, to recover upon a policy insuring such property *on account of whoever it may concern* as owner at the time of the loss, the mortgagee then being the legal owner of the property. *Rogers v. The Trader's Ins. Co.*, 6 *Paige's Rep.* 583.

55. Where actions were brought on two several policies of insurance on the same vessel, and there had been two trials in each cause, and two verdicts for the plaintiffs on the subject of unseaworthiness, the court refused to grant a third trial. *Talcott v. The Commercial Ins. Co.*, 2 *Johns. Rep.* 467.

56. The Court of Chancery will not interpose to

amend a policy of insurance without the clearest and most satisfactory proof of the mistake, and of the real contract between the parties, especially where the mistake charged is denied in the answer. *Lymans v. The United Ins. Co., 2 Johns. Chancery Rep.* 630.

57. Where a bill was filed to recover the amount of a total loss on a policy of insurance, which set forth no other ground of equitable relief than that the policy was assigned to the complainants by the insured, in whose names the insurance was effected, and that the insurers refused to pay. The defendants demurred to the bill on the grounds that the cause was properly cognizable in a court of law, inasmuch as it was not alleged that the insured had refused to let the complainants make use of their names in a suit at law, or that they were in any way hindered from prosecuting at law, or stood in need of any discovery to aid such suit. The bill was dismissed, with costs. *Carter v. The United Ins. Co., 1 Johns. Chancery Rep.* 463.

58. The underwriter is not liable either in case of a technical total loss, or of an actual loss, when it appears that the necessity, the *prima facie* ground for the abandonment, though real, was nevertheless the result of culpable negligence, or want of due diligence on the part of the owner or his agents. *The American Ins. Co. v. Ogden, 20 Wendell's Rep.* 287. See *ante*, 8, 33, 34. INSURABLE INTEREST. PRELIMINARY PROOFS, 10, 11.

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PREMIUM, 10. SHIP, 21, 24. APPENDIX, 7, 11, 34, 36, 44, 48, 68, 79, 80, 86, 98, 100, 112, 119, 120, 161, 167, 175, 193, 210, 233, 270, 320, 332.

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### PRELIMINARY PROOFS.

1. THE design of the clause inserted in the New-York policies of insurance, which declares *that the loss is to be paid in thirty days after proof of interest and loss*, is merely to furnish reasonable information to the underwriter, and is liberally construed to require only the best evidence of the fact of a loss that may be in the possession of the party at the time. *Barker v. The Phænix Ins. Co.*, 8 Johns. Rep. 307. *Lawrence v. The Ocean Ins. Co.*, 11 Johns. Rep. 241. *See post*, 9.

2. The clause which requires preliminary proof of loss, &c., before payment is to be made, is peculiar to policies in this country. The object of its introduction seems to have been to give the underwriters time to determine, after being apprized of a loss, whether they should pay without suit or not. To enable them to do so they are entitled to such proof as may afford them a reasonable satisfaction, according to the course of mercantile business. It is not necessary therefore to produce proof in a strictly legal sense, either by the oath of the party, or of witnesses. *Lenox v. The United Ins. Co.*, 3 Johns. Cases, 224.

3. Where the loss is to be paid *within thirty days after proof thereof*, the invoice of the goods, bill of lading, and protest of the master stating a loss to have happened, are sufficient preliminary proofs. If proof of *interest* is also a preliminary requisition, independent of the captain's protest, the provision can only be construed to mean the usual documentary proofs attending the subject, such as the bill of lading, invoice, and other papers if there are any. *Legal* proof could be taken only in a course of legal proceeding, or at the trial, and such proof cannot be considered as within the meaning or intention of the parties to the contract.

*Ibid.*

4. And under a policy thus worded it is not necessary to produce any proof of interest, exhibiting the protest of the master stating the loss is sufficient. *Talcott v. The Marine Ins. Co.*, 2 Johns. Rep. 130.

5. But if the policy contains a provision that *if the vessel upon a regular survey shall be declared unseaworthy, or incapable of prosecuting the voyage by reason of her being unsound or rotten, the insurer to be exonerated*, and she is surveyed during her voyage and condemned, the survey is a necessary part of the preliminary proofs, and must be exhibited, or some account must be given why it is not produced before the insured can sustain an action. *Haff v. The Marine Ins. Co.*, 4 Johns. Rep. 132.

6. The protest, invoice and original bill of par-

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cells of the goods mentioned in the invoice, a survey of the goods by which it appeared that they were damaged by sea-water, and an authenticated account of the sale of the goods at auction, have been considered sufficient proofs of interest and loss. *Johnston v. The Columbia Ins. Co.*, 7 *Johns. Rep.* 315.

7. It is not necessary that the preliminary proofs should be exhibited at the time of making an abandonment. *Barker v. The Phœnix Ins. Co.*, 8 *Johns. Rep.* 307.

8. If at the time when the preliminary proofs are produced the insurer does not make any objection to their sufficiency, but refuses to pay the loss on some other specific ground, it is an admission of their sufficiency. *Vos v. Robinson*, 9 *Johns. Rep.* 192. *Rogers v. The Trader's Ins. Co.*, 6 *Paige's Chancery Rep.* 583.

9. A copy of a letter from the master of a ship to the correspondents of his owners, informing them of the loss, which was transmitted by the correspondent to the owner, has been held to be sufficient proof of the fact that a loss had occurred, as being the best evidence that the party had in his possession. *Lawrence v. The Ocean Ins. Co.*, 11 *Johns. Rep.* 241.

10. Where, in an action on a policy of insurance, it appeared that when the underwriters were applied to for payment for a total loss, they replied that they would not settle the claim in any way; *It was held*, that this was a waiver of preliminary

proof of interest in the insured. *Francis v. The Ocean Ins. Co.*, 6 *Cowen's Rep.* 404. In Error, 2 *Wendell's Rep.* 64.

11. Where the loss is *partial*, and the preliminary proofs are so defective that the insurers cannot make up the amount of loss from the proofs before them, the court will not allow the insured to recover interest on the amount of the loss sustained. *Bridge v. The Niagara Ins. Co.*, 1 *Hall's Superior Court Rep.* 247, note. See ABANDONMENT, 63. APPENDIX, 120, 300.

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### PREMIUM.

THE premium is the consideration for which the underwriter undertakes to guarantee the happening or not happening of some particular doubtful event, or warrants the insured against some certain hazard or risk, and consequently,

1. Where the policy never attaches, as if the vessel never sails on the voyage for which the insurance is effected, or if it becomes void because of a failure of the warranty, where there has been no actual fraud practiced, the insured is entitled to a return of the premium. *Delarigne v. The United Ins. Co.*, 1 *Johns. Cases*, 310. *Duguet v. Rhinelander*, 1 *Johns. Cases*, 360. *Murray v. The United Ins. Co.*, 2 *Johns. Cases*, 250. *Forbes v. Church*, 3 *Johns. Cases*, 159. *Graves*

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v. *The Marine Ins. Co.*, 2 *Caines' Rep.* 339. *Murray v. The Columbian Ins. Co.*, 4 *Johns. Rep.* 443. *Richards v. The Marine Ins. Co.*, 3 *Johns. Rep.* 307. *Elbers v. The United Ins. Co.*, 16 *Johns. Rep.* 128. *Mellen and Nesmith v. The National Ins. Co.*, 1 *Hall's Superior Court Rep.* 452.

2. And where property is insured to a larger amount than its real value, the overplus premium is recoverable from the insurer, because the insurer shall not receive the price of a risk which he has not run. *Holmes v. The United Ins. Co.*, 2 *Johns. Cases*, 329.

3. After the risk has been incurred *on a wager policy* the insured is not entitled to a return of the premium. *Juhel v. Church*, 2 *Johns. Cases*, 333.

4. Goods were insured from Philadelphia to Hamburgh, by a policy dated May 29, 1798. The insurer *to return 15 per cent. of the premium in case an insurance had been effected in Europe*, and it was further stated in the policy, *provided that if the insured shall have made any other insurance on the premises, prior in date to this policy, the insured shall be answerable only for so much as the amount of such prior insurance shall be deficient, &c., and shall return the premium on so much of the sum insured, as they shall by such prior insurance be exonerated from; and in case of any insurance on the premises subsequent in date to this policy, the insurer shall be answerable for the full sum subscribed, &c., and be entitled to*

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*retain the premium in the same manner as if no such subsequent insurance had been made.* An insurance was also effected on the same goods at *Hamburgh* on the 19th June, 1798 ; *It was held*, that the insured was not entitled to a return of the premium on account of the insurance in *Hamburgh*. *The New York Ins. Co. v. Thomas*, 3 *Johns. Cases*, 1.

5. Where an insurance was effected on a vessel *at and from Malta to St. Petersburgh, with liberty to touch at Cagliari, Algiers, Tangiers, and Wingo Sound, &c.*, for a premium of 40 per cent., *to return 15 per cent. if the vessel passed the Gut of Gibraltar on or before the 20th of June, and the risk ends without loss ; or 15 per cent. if the risk ends in safety at Gottenburgh.* The vessel sailed on the voyage insured, and passed the Gut of Gibraltar on the 9th of July, 1812. On the 17th of July she was obliged, on account of adverse winds, to come to an anchor in the Downs for safety. While there, hearing of the advance of the French arms, and the state of the ports in the North, the master concluded to abandon the prosecution of the voyage and to go to London, where the vessel and cargo were seized on hearing of the war between the United States and Great Britain ; *It was held*, that the risk was divisible, and that the underwriters having been discharged by the act of the insured from all risk from Gottenburgh to St. Petersburgh were bound to return the 15 per cent., the stipulated premium for the said risk.

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*Ogden v. The New-York Ins. Co., 12 Johns. Rep. 114.*

6. Where by a memorandum which was added to the policy after the insurance had been effected, and after a deviation, it was agreed that *in consideration of an additional premium of ten per cent. hereby acknowledged to be received, the same shall not prejudice the insurance.* The plaintiffs claimed the return of the above premium of ten per cent. on the ground that the agreement was founded on a mistake, inasmuch as the actual deviation was not understood by them at the time of making it, and the policy having been avoided by the deviation which actually took place, was not revived by the memorandum, so that the additional premium was paid without consideration. *It was held*, that the memorandum was an agreement on the part of the insurer, and not a warranty on the part of the insured. Its object was to cover all previous deviations, and as the risk had been encountered, the insured was not entitled to a return of the premium. *Crowninshield v. The New-York Ins. Co., 3 Johns. Cases, 142.* See MEMORANDUM, 9.

7. Where at the time of effecting an insurance the insured supposed himself to have an interest in the subject matter, and the supposition turned out to be erroneous; *It was held*, that he was entitled to a return of the premium, although if he had been interested the risk would have attached. *Steinback v. Rhinelander, 3 Johns. Cases, 269.*

8. There can be no return of the premium claimed where the risk has attached even but for one moment. *Hendrick v. The Commercial Ins. Co.*, 8 Johns. Rep. See RISK, 27.

9. An action was brought by the insurers, against the endorsee on a promissory note which had been given to secure the payment of the premium on a policy of insurance. Before the commencement of the suit the insurers had become liable to pay the insured (who was the maker of the note) a return of the premium on the same policy ; *It was held*, that the defendant was entitled to have the amount of such return of premium deducted from the amount of the note ; and this notwithstanding the maker of the note was at the same time indebted to the insurers for other notes, given for premiums on other policies of insurance, and had become insolvent. *The Phænix Ins. Co. v. Figuet*, 7 Johns. Rep. 383.

10. Where the plaintiff declares for a total loss on the policy and adds the usual money counts, he is entitled to judgment for a return of the premium, if the court should be of opinion that he is not entitled to recover for a total loss on the ground that the policy never attached, *provided*, the defendants have not compelled him to elect whether he would proceed for a return of the premium or not. *Waddington v. The United Ins. Co.*, 17 Johns. Rep. 23.

11. And if the premium has not been paid into court, the plaintiffs will be entitled to receive

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interest upon it from the time of the commencement of the suit, or from the time when it ought to have been paid into court. *Ibid.*

12. The allowance of interest in such cases, rests in the sound discretion of the court, but costs will not be allowed upon the suit for a total loss under the policy. *Ibid.*

13. It is not the duty of the *ship's husband* as such to insure a vessel, nor can he, or part-owners who insure the interest of their co-owners without express authority, recover back the premium paid by them. *Turner v. Burrows*, 8 *Wendell's Rep.* 144.

14. Where a chartered vessel is lost by the perils insured against, the charterer's interest in a policy on freight *eo nomine* never attaches, and if the premium has been paid it can be recovered back in an action for money had and received. *Nesmith v. The National Ins. Co.*, 1 *Hall's Superior Court. Rep.* 452.

15. An insurance was effected on a vessel from New-York to Teneriffe, at a premium of 5 *per cent.*; and for an additional premium of  $2\frac{1}{2}$  *per cent.* permission was given to proceed from Teneriffe to the Isle of May and Bonavista, and at and from thence to New-York; to return *one per cent.* if she did not proceed to Bonavista, and the risk ended safely. The vessel arrived at Teneriffe, but was refused permission to enter or land any part of her cargo (unless after performing a quarantine of 40 days) because her bill of health was not

signed by the Spanish consul of New-York. The master, not choosing to perform the quarantine, went to Madeira, the nearest port where he could enter and land her cargo, and there sold and delivered it, and then proceeded to the Isle of May, and here he took in a cargo and arrived hence at New-York ; *It was held*, that the insured was entitled to a return of the premium of *one per cent.*, inasmuch as that part of the voyage to Bonavista, had never commenced. *Robertson v. The Columbian Ins. Co.*, 8 Johns. Rep. 491.

16. The action for a return of the premium must be brought against the underwriters ; it will not lie against the broker who transacted the business. *Bowne v. Shaw*, 1 Caines' Rep. 489. See INSURANCE, 4. RISK, 27. APPENDIX, 1, 201, 202, 203, 255.

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PRIMAGE.—*See BILL OF LADING.*

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### REGISTER.

In the language of policies of insurance, and in commercial navigation, the *registry of ships*, is their enrolment at the custom-house, so as to entitle them to be classed among, and enjoy the privileges of native built vessels. The practice was first introduced into this country by the Navigation Act, 12 Car. 2, c. 18, *anno* 1660 ; and the

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laws relating thereto were subsequently modified and improved. Since the revolution the United States have adopted the principle contained in the navigation act, and conferred especial privileges on their own ships. And no vessel is considered as belonging to the United States unless *registered*, as well as owned and commanded by a citizen of the United States. *Acts of Congress, 31st Dec. 1792*, § 1. An *American* register cannot be obtained without affidavit that no foreigner is, either directly or indirectly, by way of trust, confidence or otherwise interested in the vessel, or in the profits and issues thereof; that is, she must be wholly owned by American citizens. Without such a *register*, a vessel engaged in a foreign trade is not entitled to the benefits and privileges of an American ship, although in other respects she is recognized by law. She may sail with a sea-letter, or a certificate of ownership. *Murray v. The United Ins. Co.*, 2 Johns. Cases, 172. *The Friendship*, 1 Gallis, 45. See **WARRANTY**, 3. **APPENDIX**, 323.

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## REPAIR.

THE term *repair*, in marine insurance, means to amend, or restore, or fully to reinstate the vessel. See **ADJUSTMENT**, 28. **APPENDIX**, 151, 220.

## REPRESENTATION.

WE have already had occasion to observe that there is no contract of more vital importance to the interests of commerce and commercial men, than that of marine insurance. And on this account it has always been deemed incumbent on those who are parties to it, that they conduct themselves with the strictest integrity and candor, and that each communicate fully and fairly to the other whatever information he possesses, which might to any extent, or in any manner, vary the terms of the contract, or the nature and degree of the risk. The opportunities for information are, however, more frequently within the power of the insured than of the insurer, and therefore his statements or representations, made at the time of procuring the insurance, are watched with a more careful and rigid scrutiny. A REPRESENTATION, in marine insurance, is a collateral statement, either by parol or in writing, of such facts and circumstances relative to the proposed adventure, and not inserted in the policy, as are necessary for the information of the insurer in order to enable him to form a just estimate of the risk. It is distinguishable from a *warranty* in that the latter forms a part of the written contract of insurance, which a representation does not. If it is false in a material point, it renders the policy void ; not, however, as a part of the contract, as is the case

with a warranty, but as a fraud by which that contract was obtained. *Park on Insurance.* *Marshall on Insurance.* *Jacob's Law Dict.* *Kent's Com.* vol. 3. 1 *Edward's Chancery Rep.* 64.

1. A *representation* is defined to be a collateral statement either by parol or in writing, of such facts and circumstances relative to the proposed adventure, and not inserted in the policy, as are for the information of the insurer, in order to enable him to form a just estimate of the risk. *Justice THOMPSON, in Vandervoort v. Smith, 2 Caines' Rep.* 155.

2. It is essential to a representation that it is of some matter out of and collateral to the contract, and *makes no part of the policy*; if the fact or circumstance appears on the face of the policy it becomes a *warranty*, and is not a *representation*. *Ibid.* See APPENDIX, 36, 76, 348.

3. A representation that a vessel has been out *about nine weeks*, when in fact she had been out ten weeks and four days, is not a material misrepresentation where no fraud is intended, provided the latter period is within the usual time of performing the voyage. What is the usual time for a vessel to perform a voyage is a question for the jury to determine according to the weight of evidence. *Mackay v. Rhinelander, 1 Johns. Cases,* 408.

4. A representation saying, *I am informed of the vessel's sailing, and she is out this day twenty-six days*, is not asserting as a substantive fact that

she had been out but twenty-six days, and is not therefore a misrepresentation, although she may have been out twenty-seven days. *Williams v. Delafield*, 2 *Caines' Rep.* 329. See APPENDIX, 148.

5. A representation that a vessel is American is equivalent to a warranty that she is American. *Vandenheuvel v. Church*, 2 *Johns. Cases*, 173 n. See APPENDIX, 56.

6. A representation that a vessel would have an original bill of sale, or an attested copy on board, is not complied with even if it is on board, unless it is produced, or is capable of being produced when occasion requires. It is a material document, essential to the protection of the vessel, and necessary to be on board. *Murray v. Alsop and Pomeroy*, 3 *Johns. Cases*, 47.

7. A representation that a party is a naturalized citizen since a particular year, does not amount to a representation that he was naturalized in and not after that year. *Coulon v. Bowne*, 1 *Caines' Rep.* 288.

8. A representation in time of peace, that a vessel will sail in ballast, is substantially complied with, though she should sail with a trunk of merchandise and a few barrels of gunpowder on board. *Suckley v. Delafield*, 2 *Caines' Rep.* 222.

9. A representation to one underwriter is not evidence of a representation to a subsequent underwriter on a different policy, though it is on the same vessel and against the same risks. *Elting*

v. *Scott*, 2 *Johns. Rep.* 157 ' See **POLICY**, 1.  
**WARRANTY**. APPENDIX, 56, 127, 128, 148, 252,  
328.

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### RESPONDENTIA.

WHEN money is loaned on goods laden on board of the ship which from their nature must be sold or exchanged in the course of the voyage, the borrowers personal responsibility is then the principal security for the performance of the contract, which is therefore called *Respondentia*, and the borrower is said to take up money *at respondentia*. In this respect it is that it differs from the contract of *Bottomry*, the latter being a loan on the ship, and the former a loan on the goods. The money is to be paid to the lender, with the marine interest, upon the safe arrival of the ship in the one case, and of the goods in the other. In all other respects the two contracts are nearly the same, and come under the operation of the same principles. In the case of *bottomry*, however, the ship and her tackle, if brought home, are liable, as well as the person of the borrower, while in *respondentia* the lender looks solely to the personal responsibility of the borrower. If however the money is lent for the outward and homeward voyage, the goods of the borrower on board, and the returns of them, whether in money or in other goods purchased

abroad with the proceeds of them, are liable to the lender. *Park on Insurance.* *Marshall on Insurance.* *Jacob's Law Dictionary.* *Kent's Com.* vol. 3. *McCulloch's Com. Dict.* See **BOTTOMRY.** **MARITIME LOANS.** **ABANDONMENT**, 66. **APPENDIX**, 346, 347.

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**RETURN OF PREMIUM.**—See **PREMIUM.**

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## RISKS.

- I. **WHAT RISKS ARE WITHIN THE POLICY.**
- II. **THEIR COMMENCEMENT AND DURATION.**
- III. **HOW THEY ARE AFFECTED BY THE MEMORANDUM.**

### 1. **WHAT RISKS ARE WITHIN THE POLICY.**

1. **WHERE** besides the usual risks inserted in printed policies, the policy declares the insurance to be *against all risks*, the clause creates a special insurance and protects the insured against every loss which may happen during the voyage, except such as may arise from his own fraudulent acts. *Goix v. Knox*, 1 *Johns. Cases*, 337. See **APPENDIX**, 37.

2. Where a vessel was insured and the policy contained a clause *excepting French risks*, and the

vessel was afterwards captured by a French privateer; *It was held* to be within the exception, and to discharge the policy so that the underwriters were not liable for any subsequent loss which might take place, inasmuch as the *casus fæderis*, upon which the insurer was not to be liable, had occurred. *Roget v. Thurston*, 2 *Johns. Cases*, 248.

3. If the policy is general, and contains no warranty, or if there is no representation of neutrality, the insurer takes upon himself war risks of all kinds and of all countries. *Barnewall v. Church*, 1 *Caines' Rep.* 217.

4. If a vessel is driven into a port of necessity, and a pestilential disorder breaks out, which renders it impossible for her to pursue her voyage, it is a loss within the perils embraced in the policy. *Williams v. Smith*, 1 *Caines' Rep.* 1.

5. An interdiction of commerce hanging over the port of destination is a peril within the policy, and the vessel is not bound to proceed to the nearest port to deliver her cargo, or the affreighter to receive his goods there. *Schmidt v. The United Ins. Co.*, 1 *Johns. Rep.* 249.

6. The loss, on a *wager-policy*, must be absolutely and totally final to entitle the insured to recover under it. *Clendening v. Church*, 3 *Caines' Rep.* 141.

7. And a capture, if it is followed by a recovery is not a loss within such policy. *Ibid.*

8. Where an insurance was from *A.* to *B.*, but a different voyage was in the contemplation of the

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insured, and the vessel was lost before leaving *A.*, it was *questioned* whether the risk attached or the insurer was liable. *Steinback v. The Columbia Ins. Co.*, 2 *Caines' Rep.* 129.

9. Where an insurance was from *A.* to *B.*, with *liberty to touch at C.*, *beginning the adventure at and from A.*, and the vessel never went to *A.* but went to *B.*, and thence commenced her voyage homeward; *It was held*, that the risk never attached within the meaning of the policy: *Murray v. The Columbian Ins. Co.*, 4 *Johns. Rep.* 443.

10. Where the policy contains no warranty of neutrality, or of the character of the vessel, the underwriter takes upon himself all risks belligerent as well as neutral. *Elting v. Scott*, 2 *Johns. Rep.* 157. *See ante*, 3.

## 2. THE COMMENCEMENT AND DURATION OF RISKS.

11. Where *goods* are insured "at and from" a foreign port, the risk attaches from the time the goods are laden on board of the vessel. When applied to a *ship*, the clause *at and from* includes the period of her stay in the port from the time of her arrival there. *Patrick v. Ludlow*, 3 *Johns. Cases*, 10. *See APPENDIX*, 19, 131, 335.

12. A policy on *freight at and from* a foreign port, attaches on the commencement of the lading of the goods on board of the vessel. *Smith v. Steinback*, 1 *Caines' Cases*, 158. *See APPENDIX*, 131, 221, 222.

13. Where a vessel is at a distant port from

whence she is to sail, and it is stated that she was there on a certain day, *at and from* means the day on which she is mentioned as being there, and the risk commences from that time. It is not necessary that the insured should state how long a vessel has been in a port antecedent to the time when the policy is to attach. *Kemble v. Bowne*, 1 *Caines' Rep.* 75.

14. And if nothing is said as to her being in port at any particular day, and she has been long there previous to the insurance, the risk does not commence till some act is done towards equipping her for her voyage. *Ibid.*

15. Stating that she was there on a certain day, intends that she was there *in safety*, and that no damage previously sustained was to be made good by the insurer. *Ibid.*

16. A cargo was insured on the *return voyage* of a vessel. The policy declared that *the adventure shall begin from, and immediately following the loading thereof on board of the said vessel at the port of destination*. The vessel was not permitted on her arrival at the port of destination to remain there, but was compelled to put to sea, and to proceed to another port with her original cargo; *It was held*, that the risk which was contemplated in the policy never commenced. *Graves v. The Marine Ins. Co.*, 2 *Caines' Rep.* 339. *Richards v. The Marine Ins. Co.*, 3 *Johns. Rep.* 307.

17. Whether the act of a vessel in moving down a river on the route in a voyage insured can be con-

sidered as a commencement of the voyage or not, is a fact depending on circumstances and the *quo anima* or *bona fide* intent of the party. If she has not taken her captain on board, the presumption is that she has not commenced her voyage, although all her papers, clearance and lading are taken in. *Dennis v. Ludlow* 2 Caines' Rep. 111.

18. Where an insurance is *from A. to B. with liberty to touch at one or two ports on the north side of C., &c., the adventure to continue till the goods are safely landed at one or two ports, &c.* The risk is not determined by breaking bulk at *B.* *Gilfert v. Hallett*, 2 Johns. Cases, 296.

19. In a valued policy on profits *at and from* one port to another, and *at and from* thence back again to the original port, for which a premium is paid double of that which would be demanded for the outward voyage, the freight to the full amount of the valuation is covered on each voyage. And in case a capture should occur on the return voyage, the insured is entitled to recover the full amount of his policy, without making any deduction for the freight paid on the outward risk. *Davy v. Hallett*, 3 Caines' Rep. 16.

20. A vessel was chartered for an entire sum on a voyage from *A.* to *B.*, and *at and from* thence to *C.*, and an insurance was effected on the freight, equal to the sum for which the vessel was chartered. On the arrival at *B.* the vessel was detained by an embargo, and the insured abandoned in consequence thereof; *It was held*, that the risk

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had attached on the whole freight at the time the abandonment was made. *Livingston v. The Columbian Ins. Co.*, 3 Johns. Rep. 49.

21. Where an insurance was effected on *freight valued at the sum insured, carried or not carried* : a part of the cargo was laden on board when the vessel was driven on shore and lost in a gale of wind; *It was held*, that the risk attached, and that the insured was entitled to recover for a total loss. *De Longuemere v. The Phœnix Ins. Co.*, 10 Johns. Rep. 127.

22. Where an insurance was on *freight*, valued at \$2,000, and the whole of the cargo was ready to be shipped, and part was actually shipped on board, when a storm arose by reason of which the ship was lost; *It was held*, that the policy attached and that the insured was entitled to recover for a total loss, according to the valuation. *De Longuemere v. The New-York Fire Ins. Co.*, 10 Johns. Rep. 201.

23. An insurance was procured on the *cargo of a vessel which sailed from New-York, from Cagliari to St. Petersburg, &c.*, upon all kinds of goods laden, or to be laden on board, &c., *beginning the adventure from and immediately following the lading thereof on board*; *It was held*, that the policy attached only on such goods as were laden on board at Cagliari, and not on that part of the cargo which she had brought there with the intention of carrying it on to her ultimate port of destination, although the same was taken out while there and put on deck, and again restored

in perfect order. *Murray v. The Columbian Ins. Co.*, 11 *Johns. Rep.* 302.

24. Where a vessel is required by the municipal regulations of the country to stop without the harbor to which she is destined, in order to be examined, she continues to be protected by the policy, and the risk does not terminate until she has been moored *twenty-four hours* within the harbor. *Dickey v. The United Ins. Co.*, 11 *Johns. Rep.* 358. *Griswolds v. The National Ins. Co.*, 3 *Cowen's Rep.* 109.

25. Where the voyage on which the vessel sails, and that described in the policy are different, the risk never attaches. *Forbes v. Church*, 3 *Johns. Cases*, 159. *Steinback v. The Columbian Ins. Co.*, 2 *Caines' Rep.* 129. *Murray v. The Columbian Ins. Co.*, 4 *Johns. Rep.* 443. *Talcott v. The Marine Ins. Co.*, 2 *Johns. Rep.* 130.

26. Where the insurance is *to some port in the West Indies, and a market*, the vessel may *bona fide* go from island to island to dispose of her cargo, and the risk will not be terminated until the whole is disposed of. *Maxwell v. Robinson*, 1 *Johns. Rep.* 333.

27. A policy was effected on goods, dated 21st of December, 1808, *at and from Bristol to New-York, warranted to have sailed between the 20th of October and the first of December, 1808*. The cargo was all laden on board of the vessel at Bristol before the 1st of December, 1808; and she sailed thence for New-York after the 1st and before

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the 21st of December in the same year, and arrived at her destination in safety. The insured brought an action to recover back the premium, on the ground that as the time of her sailing was not in compliance with the warranty in the policy, it never attached ; *It was held*, that as regarded the sailing of the vessel, the warranty applied only to the *voyage* and not to the risk in port, that the policy attached on the goods in port, and consequently as the risk had been incurred there could be no return of the premium. *Hendricks v. The Commercial Ins. Co.*, 8 *Johns. Rep.* 1.

28. If the *voyage* is altered before the risk commences, the policy can never attach. Per THOMPSON, Ch. Justice. *Lawrence v. The Ocean Ins. Co.*, 11 *Johns. Rep.* 241.

29. Underwriters may contract so as to incur risks antecedent to the date of the policy. *Coggeshall v. The American Ins. Co.*, 3 *Wendell's Rep.* 283. *See The American Ins. Co. v. Griswolds*, 14 *Wendell's Rep.* 399. *See ABANDONMENT*, 32. *SHIP*, 17. *APPENDIX*, 19, 93, 94, 131, 135, 261.

3. HOW RISKS ARE AFFECTED BY THE MEMORANDUM.—*See MEMORANDUM.*

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SALVAGE.

This term was used originally to denote the thing or goods saved from the general wreck or

loss, and in the older law books it will be found invariably to have this signification. In more modern phrase however, and at the present time, it is understood to designate the allowance which is made for saving the ship, or goods, or both from the dangers of the sea, fire, pirates, or enemies, or from any other accident or misfortune. Policies of insurance usually authorize the insured to sue and labor for the recovery of the subject insured, and the underwriter becomes liable for whatever expenses may be incurred in the attempt to recover the lost property, in addition to the payment of a total loss. At *common law* the party who saved the goods of another from any imminent peril was allowed to retain them in his possession until the salvage was paid. It is generally regulated, however, by statutory provisions in all maritime countries. Those made by the Laws of the United States are limited to cases of re-capture only, and it is left with the Courts of Admiralty to fix the rate of salvage at their discretion, and according to the circumstances, in cases of wrecks, or perils at sea, &c. &c. *Park on Insurance.* *Marshall on Insurance.* *Kent's Com.* vol. 3. See *Talbot v. Seamen*, 1 *Cranch's Rep.* 1. *Loss*, 14. APPENDIX, 70, 116<sup>a</sup>.

By the act of Congress of 2d March, 1799, § 7, the salvage of vessels and goods re-captured from the enemy, after having been in their possession ninety-six hours, is established at one half their value. The rule adopted in the *English Admiralty*

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as to salvage is founded on principles of reciprocity, and regulated by the laws of that country to which the recaptured belongs ; yet it was declared by Sir William Scott, on the 17th of December, 1798, to be the practice of the *English Admiralty* to restore *American* property on the rule of the English Admiralty without inquiring into the practice of *America*. The English rule of salvage is one-eighth, if re-captured by a single ship, and if by the joint operation of two or more, the salvage is left to be settled by the Admiralty, according as it shall judge fit and reasonable. *Muir v. The United Ins. Co.*, 1 *Caines' Rep.* 53.

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#### SEA-WORTHINESS.—*See SHIP.*

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#### SHIP.

It is an implied condition or stipulation in all policies of insurance, that the ship employed for the voyage shall be sea-worthy, and shall not be changed unless from necessity, without the consent of the underwriter, and shall be conducted and navigated according to law. *Park on Insurance.* *Marshall on Insurance.*

##### I. SEA-WORTHINESS, OR COMPETENCY FOR THE VOYAGE.

##### II. CHANGING THE SHIP.

1. **SEAWORTHINESS, OR COMPETENCY FOR THE VOYAGE.**

1. There is an implied warranty in every contract of insurance that the vessel shall be seaworthy. *Silva v. Low*, 1 *Johns. Cases*, 184. *Barnwell v. Church*, 1 *Caines' Rep.* 217. *Talcott v. The Marine Ins. Co.*, 2 *Johns. Rep.* 130. *Talcott v. The Commercial Ins. Co.*, 2 *Johns. Rep.* 124. *Warren v. The United Ins. Co.*, 2 *Johns. Cases*, 231. *American Ins. Co. v. Ogden*, 15 *Wendell's Rep.* 532. *See post*, 11, 18. **APPENDIX**, 334.

2. The vessel must not only be in herself seaworthy, but she must be duly manned and equipped with a competent crew who are engaged for the voyage insured. *Silva v. Low*, 1 *Johns. Cases*, 184. *See APPENDIX*, 211, 333, 336.

3. And an intention formed before the commencement of the voyage to stop at an intermediate port and procure seamen, is evidence either that the crew were not competent, or that they were not engaged for the voyage insured. *Ibid.* *See APPENDIX*, 212.

4. One hand besides the captain is not a sufficient crew for a vessel of 35 or 40 tons, on a coasting voyage. *Dow v. Smith*, 1 *Caines' Rep.* 32.

5. Where a vessel was seaworthy at the time she sailed, and on the morning of the next day suddenly sprung a leak and was lost, without any stress of weather or other apparent cause to which

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the leak could be ascribed ; *It was held*, that the accident was to be ascribed to some latent and inherent defect in the vessel which rendered her unseaworthy, and that consequently the insurers were not liable—they do not insure against *latent* defects. *Patrick v. Hallett and Bowne*, 3 *Johns. Cases*, 76. *See Patrick v. Hallett*, 1 *Johns. Rep.* 241. *Talcott v. The Commercial Ins. Co.*, 2 *Johns. Rep.* 124. *Barnewell v. Church*, 1 *Caines' Rep.* 217.

6. In similar circumstances it was held to be presumptive evidence that the vessel was not seaworthy. *Talcott v. The Commercial Ins. Co.*, 2 *Johns. Rep.* 124. *Talcott v. The Marine Ins. Co.*, 2 *Johns. Rep.* 130.

7. And it *seems* that a vessel may be competent to perform her *voyage*, although she has not all proper documents or papers on board, as this is only requisite when the national character of the vessel is warranted or represented to the underwriter. *Elting v. Scott*, 2 *Johns. Rep.* 157.

8. A vessel was insured *from New-York to Bordeaux*, and after having been out about thirty days was without fire-wood, oil or candles, so that for the want of the necessary light she was obliged to slacken sail at night and was hindered in her *voyage*; *It was held*, that she was not to be deemed sea-worthy. *Fontaine v. The Phœnix Ins. Co.*, 10 *Johns. Rep.* 58.

9. Where a vessel during a storm lent a cable and a small anchor to another vessel, and was

thereafter driven ashore and lost, the jury having found a verdict for the insured, the Supreme Court refused to disturb the verdict upon an application made on the ground of unseaworthiness. *Patrick v. The Commercial Ins. Co.*, 11 Johns. Rep. 9.

10. Unseaworthiness will be *intended* where no visible or known cause can be assigned for the loss of the vessel. *Patrick v. Hallett*, 3 Johns. Cases, 76. *See ante*, 5.

11. It is a well settled and clear principle of law that the want of seaworthiness in the vessel will affect a policy on the goods, as well as on the vessel, for it is an implied warranty in every contract of insurance, whether on goods or ship, that the ship is seaworthy, and competent to perform the voyage. *Warren v. The United Ins. Co.*, 2 Johns. Cases, 231.

12. And if the vessel has been surveyed and pronounced competent to the voyage previous to her sailing, it will make no difference, if in the course of the voyage she shall not prove to be seaworthy. *Ibid.*

13. As respects unseaworthiness, admiralty surveys are *ex parte* evidence and are not admissible. *Abbott v. Sebor*, 3 Johns. Cases, 39. *Saltus v. The Commercial Ins. Co.*, 10 Johns. Rep. 487.

14. A policy contained a clause that *if the vessel upon a regular survey, should be declared unseaworthy by reason of her being unsound or rotten; or incapable of prosecuting her voyage on account of her being unsound or rotten, the in-*

*surers shall not be bound to pay their subscription; It was held, that if the survey and condemnation did not proceed on the single ground that the vessel was unsound or rotten, but on that fact in connection with other defects and circumstances, they were not conclusive. *Haff v. The Marine Ins. Co.*, 8 Johns. Rep. 163. See post, 19. APPENDIX, 108.*

15. It is not essential, however, that the survey should follow the exact words of the policy containing such a clause. If it states particularly the facts from which the conclusion as to her unseaworthiness is drawn, and that *for that cause alone* she is declared unseaworthy, it will be sufficient. *Brandegee v. The National Ins. Co.*, 20 Johns. Rep. 328. See APPENDIX, 113, 246, 293.

16. It is a question of fact for the jury to determine, whether the vessel was seaworthy or not. *Patrick v. Hallett*, 1 Johns. Rep. 241. *Treadwell v. The Union Ins. Co.*, 6 Cowen's Rep. 270.

17. A cargo was insured *at and from North Carolina to New-York*, and *it was held*, that it was sufficient if the vessel was seaworthy when she passed the boundary line of North Carolina, and that her previous seaworthiness was an immaterial point, inasmuch as the insurers could not be considered responsible for a loss which might happen previous to her arrival at the boundary line, which was the point of her departure. *Treadwell v. The Ocean Ins. Co.*, 6 Cowen's Rep. 270.

18. Seaworthiness is an implied warranty in a

policy, but it relates only to the time when the risk commences. If it is then broken, the underwriter is discharged from his liability. Yet a breach of this warranty will not discharge the insurer from a loss subsequently occurring, if such loss is not the consequence of unseaworthiness. *The American Ins. Co. v. Ogden*, 15 Wendell's Rep. 532. See APPENDIX, 211.

19. In an action on a policy containing a provision that if the vessel, upon a regular survey, should be thereby declared unseaworthy, or incapable of prosecuting her voyage, by reason of her being unsound or rotten, the insurers should not be bound to pay the subscription. The conclusion of surveyors that the vessel was unworthy of repairs, that she could not be sold to the amount of her bill, and their recommendation that she should be sold for the benefit of all concerned, it was held, were equivalent to a declaration in the survey that she was unseaworthy and incapable of prosecuting her voyage by reason thereof, and that such declaration being upon a regular survey, it was in accordance with the terms of the contract, and consequently conclusive as to the question of seaworthiness, and therefore the insured could not recover. *Rogers v. The Niagara Ins. Co.*, 2 Hall's Superior Court Rep. 86. See ante, 14.

20. A defect of seaworthiness which arises after the commencement of the risk, and which is permitted to continue through bad faith, or the want of ordinary prudence or diligence on the part of

the owner or his agents, will discharge the underwriters from liability for any loss which may be the result of such want of good faith, prudence, or diligence. But they are nevertheless still liable as to any loss which may arise from any other risk covered by the policy, *provided* the same has not been occasioned or enhanced by such particular defect. *The American Ins. Co. v. Ogden*, 20 *Wendell's Rep.* 287. See APPENDIX, 106, 107, 226, 232.

## 2. CHANGING THE SHIP.

21. It is the duty of the master, whenever the ship becomes disabled in the prosecution of her voyage, to procure another vessel if it is in his power, and the insurer is not answerable for the consequence of his voluntary neglect or omission to do so, unless where such neglect or omission is the result of an act of barratry. It is a general rule, that in order to entitle himself to recover on the ground of a loss of the voyage, the plaintiff in an action on the policy must show that another vessel could not be obtained. *Schiefflin v. The New-York Ins. Co.*, 9 *Johns. Rep.* 21. *Treadwell v. The Union Ins. Co.*, 6 *Cowen's Rep.* 270.

22. The master is not bound, however, to seek another vessel to carry on the cargo, out of the port of distress, or out of a port imminently contiguous thereto. *Ibid.* *Saltus v. The Ocean Ins. Co.*, 12 *Johns. Rep.* 107.

23. But where the cargo is of such a nature that

it is impracticable to reship and transport it to the place of destination, unless at an expense equal to its value, or nearly so, or without manifest detriment to the owners, it may be sold at the port of distress, and need not be sent on in another vessel. *Ibid.*

24. The underwriter must show that the goods were actually delivered to the insured at the port of destination, or that the insured had notice of their arrival and situation ; otherwise he will not be entitled to any deduction from the loss, or *to any* allowance for the freight earned, on whatever portion of the goods were sent on to the said port. *Ibid.*

25. A ship-owner who is entitled to abandon by reason of the extent of an injury received by the vessel from any of the perils insured against, cannot be required by the shipper of the cargo to repair the vessel for the purpose of sending on the cargo ; he can be required to send it on only in case another vessel can be obtained for the purpose. *The American Ins. Co. v. Center, 4 Wendell's Rep. 45.*

26. *It seems* that in case the cargo is sent on in another vessel for the benefit of salvage on the freight, the underwriter on the freight is bound to pay the expense of the transhipment, and the owner, or underwriter on the cargo, is chargeable with only the extra expense beyond the amount of freight as fixed in the original charter-party. *Ibid.*

## SHIP'S HUSBAND.

SHIP'S HUSBAND is an agent appointed by deed executed by the owners, with power to advance, lend, &c., to make all payments, and to retain all claims, &c. His duties are, to see to the proper out-fit of the vessel, that she is properly repaired, prepared for the voyage, and furnished with provisions and sea-stores; to provide a proper master, mate and crew; to see that she has a proper register and documents on board, and is duly cleared from the custom-house; to engage and settle for freight and adjust averages; to enter into charter-parties for the employment of the ship; and to settle and pay, and keep a regular account of all contracts, payments, and receipts in the course of such employment. In relation to all these matters he is the agent of the owners, and may charge them jointly. But as regards the ship itself, each owner has a distinct and separate interest as a tenant in common, which such owner may or may not insure at his pleasure. The ship's husband has no authority to insure, either the whole or any part of the vessel, without the express direction of the owner thereof. *Marshall on Insurance.* *Turner v. Burrows*, 8 *Wendell's Rep.* 144. See PREMIUM, 13. APPENDIX, 169.

## STRANDING.

STRANDING, as used in policies of insurance, is where a ship by accident, or the force of wind, or the violence of the sea, takes ground, or is on the strand, and remains stationary for some time. And it must be occasioned by some accident happening out of the ordinary and usual course of navigation. *Kent's Com.* vol. 3, 323 *n.* See ABANDONMENT, 22, 23, 24, 25. Loss, 49, 55. MEMORANDUM, 5.

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## SURVEY.

1. A *survey* is always made at the instance and request, and for the benefit of the owner or master of the vessel, and goes of course into his hands. The insurers are not considered parties to it. *Griswolds v. The National Ins. Co.*, 3 *Cowen's Rep.* 96.

2. It is proper but not indispensably necessary that the survey should state the particulars of the decay. *Ibid.*

3. It is properly made within a reasonable time after the vessel arrives at her port of destination, and need not be made before. *Ibid.* See SHIP, 14, 19. APPENDIX, 267, 293, 297, 309, 315, 318, 321, 349.

## SUPERCARGO.

THE *supercargo* of a vessel is a person employed by merchants to go out on a voyage in order to oversee their cargo, and dispose of it to the best advantage. He is also employed to invest the proceeds thereof in the purchase of a homeward cargo, and sometimes to invest funds furnished by his employer at a foreign port, in a cargo for the home market.

1. If one of three partners in a cargo, goes out in the vessel on board of which the cargo is laden as supercargo, his power and authority *as partner* become merged in his character of supercargo from the commencement of the voyage. *Catlett v. The Pacific Ins. Co.*, 1 *Wendell's Rep.* 561.

2. If the instructions given to the master of a vessel are, to proceed to a particular port and there deliver his cargo to *A. B.* supercargo on board ; *A. B.*, *as supercargo*, has no control over the cargo until it arrives at the port of destination, and the master has no right to deliver it to him in that character until such arrival. *Ibid.*

3. If the voyage should be broken up before the vessel arrives at the port of destination and the cargo is abandoned by the insured, and the master delivers it to the supercargo, such delivery thereof constitutes the supercargo the agent of the master, and his subsequent acts are to be considered as

the acts of the master, who after an abandonment becomes the agent of the insurers. *Ibid.*

4. If the supercargo neglects to put in a claim to a vessel which has been captured for an alleged violation of navigation laws, it will not affect the claim of the insured for a total loss. *Francis v. The Ocean Ins. Co.*, 6 *Cowen's Rep.* 404. *In Error*, 2 *Wendell's Rep.* 64.

5. Where the owner of *one sixth* of the cargo went out in the vessel as supercargo, and made a sale of the cargo, and invested the proceeds in other merchandise for the purpose of remittance, a *technical total loss* having occurred, and the cargo having been left under his control by the master of the vessel; *It was held*, that it did not destroy the right of the other owners, who had insured their separate interests therein, to abandon the same to the underwriters, *provided* under the circumstances it would have been the duty of the master to have made the same investment for the benefit of whom it might concern. *The Pacific Ins. Co. v. Catlett*, 4 *Wendell's Rep.* 75. *The American Ins. Co. v. The Same*, 4 *Wendell's Rep.* 80.

6. A supercargo who is to receive a compensation out of the homeward cargo, as he begins to render his services at the commencement of the voyage and so continues, sustains an absolute loss of time and skill in case the cargo does not arrive. An insurance upon his interest is therefore strictly a contract of indemnity. *The American Ins. Co.*

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v. *Catlett*, 4 *Wendell's Rep.* 92. See ABANDONMENT, 69. DEVIATION, 2. APPENDIX, 158, 170.

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### TRADE.

IN order to render a policy of insurance effective, the trade for which the voyage is to be pursued, or the adventure undertaken, must be allowed by the laws of the land where the contract is entered into. But whether or not an insurance effected on property in a trade prohibited by the laws of a foreign country shall be considered valid, and capable of being enforced in the country where such trade is allowed, is a question very much controverted among writers on marine insurance. It was decided by Lord Mansfield, (whose decisions seem to be the foundation of the Law of Marine Insurance in England,) that the insurer is liable for losses which may be sustained in consequence of the violation of the laws of trade in a foreign country, *provided* he was fully aware at the time when he subscribed the policy, that such illicit trade was in the contemplation of the insured. If the underwriter knows the trade to be unlawful and does not mean to assume it, he must signify his exception to that part of the risk, otherwise it will be presumed that he intended to insure against it. The principle established by

these decisions, has been adopted in this country.  
See WARRANTY AGAINST ILLICIT TRADE, &c., 30.  
LAWFUL GOODS.

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### TRADING VOYAGE.

1. WHERE a policy was effected upon goods and merchandise laden or to be laden on board of a ship *for and during the term of six calendar months*, without reference to any particular voyage, the risk to commence *from and immediately following the loading of the goods on board of the vessel*; *It was held*, that a *trading voyage* was evidently in the contemplation of the parties, and that the policy was to be construed in the same manner as if a trading voyage had been expressed, with liberty to touch and trade at such and such places and ports on the globe as the insured should see fit, subject to the usual and customary mode of transacting business at the several places visited by the vessel, and that however frequently the goods might be changed the policy would still continue and attach. *Coggeshall v. The American Ins. Co.*, 3 *Wendell's Rep.* 283.

2. If the goods are lost while in the course of transportation from the shore to the ship engaged in a trading voyage, the insurer is liable, *provided* the measures adopted for the transportation of them were according to the known and established

course and usage of trade at the place where the goods were endeavored to be laden on board of the vessel. *Ibid.*

3. *It seems* that the point is not established in this country, that where the insured takes the goods in *his own lighter* for the purpose of landing them and they are lost, the insurer is exonerated from liability. *Ibid.*

4. Where goods were shipped on a trading voyage under a policy *on time*, and the value of the entire cargo exceeded the sum subscribed ; *It was held*, that the insurer to a specified amount is liable to the full amount of his subscription, if, after landing a portion of the cargo in safety at the first port where the vessel tarried to trade, the residue of the cargo is wholly lost by one of the perils insured against, *provided* that at the time of the loss there are goods on board to an amount equal in value to the sum subscribed, which is the only question which can in such case arise between the insurer and the insured. *The American Ins. Co. v. Griswold*, 14 *Wendell's Rep.* 399. See DEVIATION, 5, 6. APPENDIX, 1, 114, 141, 192.

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## TRANSFER.

THE transfer of a vessel to *A.* in trust to secure a debt due to *B.*, who is a subject of one of the belligerents, without notice, destroys the neutrality of the vessel and avoids the policy. *Murray v.*

*The United Ins. Co., 2 Johns. Cases, 168. See WARRANTY, 19, 20, 21.*

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### UNDERWRITER.

THE person who subscribes the contract of insurance is called the underwriter, or insurer. He is bound to know any cause which may occasion *natural* perils, as the season of the year, the peculiar dangers of the voyage from its course, the prevalent winds and the like. He is also bound to know what may occasion *political* perils, as the state of war between states as well as the various operations of war, and also the general course of trade in relation to the voyage and the property which he insures. *Seton v. Low, 1 Johns. Cases, 6. Wadsworth v. The Pacific Ins. Co., 4 Wendell's Rep. 33. See POLICY, 31. APPENDIX, 164, 168, 329.*

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### WAGER-POLICY.—*See POLICY.*

1. It has been decided by our courts that a wager-policy is valid at common law. *Juhel v. Church, 2 Johns. Cases, 333. Abbott v. Sebor, 3 Johns. Cases, 39. Clendenning v. Church, 3 Caines' Rep. 141.*
2. An insurance on profits, *no other proof of interest to be required but the policy, if the goods*

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*did not arrive the insured to recover for a total loss, warranted free from average, and without benefit of salvage, is a wager policy. Juhel v. Church, 2 Johns. Cases, 333.*

3. If the insurance is on profits or freight, and the insured has an interest in the subject matter which is to produce them, it is not a wager policy. *Clendenning v. Church, 3 Caines' Rep. 141.*

4. In order to entitle the insured to recover on a wager policy, the loss must be absolutely and finally total. And where there is a subsequent recovery *a capture* is not a loss within the policy. *Ibid. Buchanan v. The Ocean Ins. Co., 6 Cowen's Rep. 318. See PREMIUM, 3. RISKS, 6, 7.*

*Note.* The revised statutes of this state have rendered wager-policies of insurance illegal and void. *R. S. vol. 1, p. 666, sec 8, 9, 10. 3 Kent's Comm. 278.*

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## WARRANTY.

A WARRANTY is an agreement or stipulation on the part of the insured, in the nature of a condition precedent. It either vouches for the truth of some positive affirmation, or stipulates for the performance or happening of some condition or contingency on the failure of which the contract is rendered invalid. It is either express or implied. An *express warranty* must appear upon the face of the policy, of which it becomes a part, and con-

stitutes a condition in the contract which is binding upon the insured and requires of him a literal and strict compliance therewith. It is of no consequence for what purpose it was inserted in the policy, or whether the thing warranted is or is not material, or whether the loss is or is not occasioned by a breach of it. The contract is void if the warranty itself is broken. An *implied warranty* is such as necessarily results from the nature of the contract, as for instance that the ship shall be seaworthy when she commences her voyage ; that she shall be navigated with reasonable skill and care, that the voyage is lawful and shall be performed according to law, and in the usual course without any wilful deviation. *Park on Insurance.* *Marshall on Insurance.* *Kent's Comm.* vol. 3. *See REPRESENTATION. SHIP. APPENDIX, 57.*

**I. EXPRESS OR IMPLIED WARRANTY.**

**II. WARRANTY OF NEUTRALITY.**

**III. WARRANTY AGAINST ILLICIT, PROHIBITED  
OR CONTRABAND TRADE.**

**IV. OTHER WARRANTIES.**

**1. EXPRESS OR IMPLIED WARRANTY.**

1. There are no precise words which are requisite to constitute a warranty. It is a written declaration upon the face of the policy of some fact respecting the subject of the insurance ; and if a vessel is named in the policy as the *American ship* \* \* \* \*, it is an implied warranty on the part

of the insured that she is American property. *Goix v. Low*, 1 *Johns. Cases*, 341. *Murray v. The United Ins. Co.*, 2 *Johns. Cases*, 168. *Haskin v. The United Ins. Co.*, 2 *Johns. Cases*, 173, note. *Vandenheuvel v. The United Ins. Co.*, 2 *Johns. Cases*, 127. *Same case in Error*, 2 *Johns. Cases*, 451. *Barker v. The Phænix Ins. Co.*, 8 *Johns. Rep.* 307. *Kemble v. Rhinelaender*, 3 *Johns. Cases*, 130.

2. A representation that a vessel is *American*, contained in the letter of instructions directing the broker to effect an insurance, is equivalent to a warranty even although there is no warranty contained in the policy. *Vandenheuvel v. Church*, 2 *Johns. Cases*, 173, note.

3. The warranty of *American property* is sufficiently supported by proof that the vessel is owned by citizens of the United States, and that she cleared from an American port, and had a register. *Catlett v. The Pacific Ins. Co.*, 1 *Wendell's Rep.* 561.

4. Where a vessel is *warranted British*, general evidence of her national character is sufficient *prima facie* evidence until doubts are raised by proof produced on the other side. *Per Waltham, Chancellor. The Ocean Ins. Co. v. Francis*, 2 *Wendell's Rep.* 64. *See post*, 11.

## 2. WARRANTY OF NEUTRALITY.

5. The character of the property is determined by the *domicil* of the owner thereof. It is well

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settled that this is the test by which to determine whether a person is to be regarded as an alien, or a citizen, or subject. Public ministers and consuls engaging in business inconsistent with, or foreign to their public or diplomatic character, are thenceforth to be considered as *domiciliating* themselves abroad, and becoming as subjects, amenable to the ordinary jurisdiction of their courts. The property therefore of an American consul doing business as a merchant, in the country to which he is deputed cannot be considered *American property* so as to support a warranty to that effect in the policy. *Arnold v. The United Ins. Co.*, 1 *Johns. Cases*, 363. Affirmed in Error in 1801. *Jenks v. Hallett*, 1 *Caines' Rep.* 60. See APPENDIX, 169.

6. A subject of a belligerent state emigrates to this country *flagrante bello* and becomes naturalized, such naturalization will not support a warranty of neutrality. The warranty of American property must be considered with reference to the belligerent powers. Its intention is that the property shall be neutral in regard to them, and an emigration *flagrante bello* will not, and cannot, rightfully change the duties and responsibilities of the party as to his own sovereign. He may still claim him as a subject, and the enemy of that sovereign may treat him as an enemy. By his naturalization here he acquires only municipal privileges. He is left in *statu quo* as to his pre-existing relations to other nations. *Duguet v.*

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*Rhinelander, 1 Johns. Cases, 360. Jackson v. The New- York Ins. Co., 2 Johns. Cases, 191.*

The contrary was held in the Court of Errors. *Duguet v. Rhinelander, 2 Johns. Cases, 476. 1 Caines' Cases in Error, xxv.*

7. The property of a citizen, resident in a belligerent country, is not neutral within the warranty. If according to the law of nations, persons having their domicil in a foreign country are subject to contribute to the exigencies of the state by paying a portion of the public taxes, and obliged to defend it, they can have no pretensions to be regarded as neutrals. They form a part of the efficient force of the country in which they reside, that force which is required and exerted to repel or annoy its enemies. It would seem strange, that, in a situation so intimately connected with that country, as to render it difficult to distinguish them from its subjects, the protection of neutrals should be extended to them. *Arnold v. The United Ins. Co., 1 Johns. Cases, 363. Elbers v. The United Ins. Co., 16 Johns. Rep. 128. See ante, 5.*

8. And if he has partners residing in a neutral country, their joint property will not be neutral within the policy. *Ibid. See APPENDIX, 54.*

9. *A.* and *B.* were subjects of Sweden, and were engaged in trade as partners at St. Bartholomews. In 1811, *B.* came to the United States, and in July, 1813, he still remaining here, a policy of insurance was effected *on account of A. and B.* on goods from New-Haven to St. Bartholomews,

*warranted Swedish property*; *It was held*, that from the long previous residence of *B.* in this country, it was to be presumed that it was his intention to reside here permanently, which presumption it was incumbent on the insured to repel, and as they had not done so *B.* was to be considered as *domiciled* in the United States, and that consequently the warranty was not complied with. *Elbers v. The United Ins. Co.*, 16 *Johns. Rep.* 128.

10. Property which belongs to the subject of a belligerent state who is *domiciled* in the United States, is neutral within the meaning of the warranty. *Johnson v. Ludlow*, 1 *Caines' Cases in Error*, xxix. The same case, 2 *Johns. Cases*, 481.

11. Where the *cestui que trust* of the profits of a vessel is the subject of a belligerent, the warranty of neutrality is not complied with. The representation or warranty of neutrality requires that the property should be *wholly* neutral. If one who is the subject of a belligerent has an interest, whether that interest is partial or entire, the risk is thereby increased, and the warranty is not complied with. Whether it is a *legal* or an *equitable* interest is not material to the question. It is sufficient if the party has a vested interest which he may enforce in some of the courts of any country, the property is not *wholly* neutral, and the warranty of neutrality implied in the words naming the vessel as an American ship, is not complied with. *Murray*

v. *The United Ins. Co.*, 2 Johns. Cases, 168. *See ante*, 1.

12. Sailing for a port which is understood to be blockaded is not such a breach of neutrality as will affect the warranty. In *Error, Vos et al. v. The United Ins. Co.*, 2 Johns. Cases, 469. Same case, 1 *Caines' Cases in Error*, vii. *Contra*, in the Supreme Court, whence this cause was brought up on a writ of Error, and that judgment was reversed. (2 Johns. Cases, 180.) *See Williams v. Smith*, 2 *Caines' Rep.* 1. *Liotard v. Grates*, 3 *Caines' Rep.* 226. *Schmidt v. The United Ins. Co.*, 1 Johns. Rep. 249. *Suydam v. The Marine Ins. Co.*, 2 Johns. Rep. 138.

13. To constitute a blockade so as to affect the warranty in a policy by a breach of it, there must be an actual existing force before the port supposed to be blockaded at the time it is entered. The *animo revertendi* of the obsiduary fleet does not continue the blockade, and the entry of a neutral, although after being warned, is not a breach of neutrality if the blockading force is not before the port. *Williams v. Smith*, 2 *Caines' Rep.* 1. *See BLOCKADE*.

14. If the fleet should be accidentally removed either by winds or tempests, the blockade will not be suspended, and if under such circumstances the neutral should attempt to enter after having been notified of the cause of its absence, it will constitute a breach of the blockade. *Radcliff v. The United Ins. Co.*, 7 Johns. Rep. 38.

15. But the neutral must have actual or constructive notice before he can be deemed *in delicto* for having attempted to enter in violation of a blockade. *Ibid.*

16. The warranty of neutrality imports not merely that the property is neutral, but also that it shall be accompanied with all the customary documents to insure its being respected as such within the Law of Nations. *Blagge v. The New-York Ins. Co.*, 1 *Caines' Rep.* 549. *Coolidge v. The New-York Firemen's Ins. Co.*, 14 *Johns. Rep.* 308. *See APPENDIX*, 77, 170, 236, 237.

17. The same principle requires that it shall be unaccompanied with any document which shall compromit its neutral character. If therefore the vessel should have on board two sets of papers, one neutral and the other belligerent, or is in any way invested with the double character of neutral and belligerent, it will be a breach of the warranty. *Ibid.* *See APPENDIX*, 78, 238.

15. It is not sufficient that a part only is so, but the whole property covered by the policy must be neutral. And if the homeward cargo is stated to have been purchased with the proceeds of the outward cargo, and it should appear that the former cost more than the latter sold for, the insured must show that the excess was also the product of neutral funds. *Ibid.*

19. The party who engages for the neutrality of the subject insured, cannot himself change its neutral character without the forfeiture of his rights

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under the policy, and a transfer of a part of the subject insured to the subject of a belligerent, though it should be made after a capture, is a breach of the warranty of neutrality. *Goold v. The United Ins. Co.*, 2 *Caines' Rep.* 73.

20. Where a merchant in this country agrees to deliver goods to a merchant in France at a stipulated price, and on the performance of certain conditions by the latter, and the consignor takes upon himself the risk attending the transportation of them, the property in the goods is not changed until their delivery, and the warranty of neutrality is complied with. *Ludlow v. Bowne*, 1 *Johns. Rep.* 1.

21. Where a cargo consisting of flour, &c., was insured *from New-York to Havana, and at and from thence to La-Guira and Porto-Cabello, or either of them, warranted American property.* The cargo was purchased in New-York of the plaintiff, who was an American citizen, by L., a Danish citizen of St. Thomas, then here, under a contract which was made here and by which the plaintiff agreed to deliver the cargo to L. at Havana, La-Guira, or Porto-Cabello *at five per cent. advance* on the invoice or prime cost, and the freight and premium of insurance, which were to be paid by the plaintiff. The plaintiff consigned the cargo to Spanish merchants at Havana, who were designated by L., with instructions to dispose of the cargo for the plaintiff's account, &c., or to send it to another market, that is to a *windward*

*port.* It was also expressed in the bill of lading that the cargo was shipped for the account and risk of the plaintiff, to be delivered at Havana to H. and C., or their assigns paying no freight, it being the property of the owner of the vessel (the plaintiff.) On the arrival of the vessel at Havana the consignees interlined the bill of lading with the words *or market*, and instructed the master to proceed to La-Guira. While pursuing her voyage to that place the vessel was captured by a Venezuelan privateer and carried into a port in the Island of Margarita. The cargo was there libelled and condemned as prize, &c. In an action on the policy *it was held*, that the cargo continued to be the property of the plaintiff until its delivery at one of the places mentioned, that there was no delivery or acceptance of it at Havana, and that the consignees in instructing the master to proceed to La-Guira acted as the agent of the plaintiff, who continued owner of the cargo until the capture, and that consequently the warranty of neutrality was complied with. *De Wolf v. The New-York Firemen Ins. Co.*, 20 Johns. Rep. 214. In Error, 2 Cowen's Rep. 56.

22. Such a contract of sale is legal by the municipal laws of New-York as well as by the Law of Nations, and cannot therefore affect the neutral character of the property. The vendor agrees to deliver the thing to be sold at a future time, and the purchaser engages to pay the price when he shall receive the thing purchased. In such a case

the property in the subject matter of the contract remains in the vendor until it is delivered. *Ibid*, in Error.

23. Where a policy does not contain any warranty either of neutrality or of the character of the vessel, the insured is not bound to show that the vessel had a sea-letter or other papers determining her national character on board. *Barnwell v. Church*, 1 *Caines' Rep.* 217. *Elting v. Scott*, 2 *Johns. Rep.* 157, 130.

24. The right of neutral and peaceful states to carry on commerce with countries at war, except in contraband articles and with places in a state of blockade, is perfect and unquestionable. Yet the question may frequently arise whether the contract is a fraudulent disguise to give to the property the character of neutral during its transit, and whether the property really and in truth belongs to the neutral or to the enemy. *New-York Firemen's Ins. Co. v. De Wolf*, 2 *Cowen's Rep.* 56.

24<sup>a</sup>. Sailing with a passport obtained from a belligerent power as protection against its own cruisers, is not sailing under the protection of that power so as to destroy the national character of the vessel. It is customary for vessels to endeavor to protect themselves by papers of this description from the public agents of every nation from which they can be obtained, and they have been regarded as affording security instead of endangering their neutrality. *Jenks v. Hallett*, 1 *Caines' Rep.* 60.

24<sup>b</sup>. Therefore a *certificate of origin* from a

*French consul* is no breach of a warranty of American property. *Le Roy v. The United Ins. Co.*, 7 Johns. Rep. 343. *See post*, 37, 44. APPENDIX, 43, 44, 54, 55, 82, 84, 85, 205.

### 3. WARRANTY AGAINST ILLICIT, PROHIBITED, OR CONTRABAND TRADE.

25. In order to constitute a breach of a warranty *against seizure or detention on account of illicit or prohibited trade, &c.*, there must be an illicit or prohibited trade in fact existing. It is not sufficient that there has been a condemnation under pretext of such a trade. *Johnson v. Ludlow*, 1 *Caines' Cases in Error*, xxix. *Same case*, 2 Johns. Cases, 481. *See Laing v. The United Ins. Co.*, 2 Johns. Cases, 174.

26. Where a vessel *warranted not to be employed in an illicit trade* is condemned by an admiralty court acting as a municipal court to carry into effect navigation laws, for a violation of those laws, in order to support the allegation of a breach of the warranty, it is incumbent on the underwriters to prove the existence of the laws alleged to be violated, inasmuch as courts cannot judicially notice the municipal laws of foreign countries, but require them to be proved like other facts. Per WALWORTH, Chancellor. *The Ocean Ins. Co. v. Francis*, 2 *Wendell's Rep.* 64.

27. The facts of seizure and condemnation are not enough to support the allegation of a breach of the warranty, the law under which the same

took place must be produced and proved. *Ibid, per SPENCER, Senator.*

28. If at the time of subscribing a policy of insurance the underwriter is aware that other goods which are contraband of war have been laden on board of the same vessel, he will not be protected by the warranty against a loss occasioned by trading in articles contraband of war. He takes the risk of all the consequences that might result to the lawful from the illicit goods, the warranty extending, in the understanding of the parties, to those goods only which were the subject of the contract. *Bowne v. Shaw, 1 Caines' Rep. 489.*

29. In a policy on *commissions on lawful goods* the warranty against contraband goods is not violated, although the insured is master of the vessel and consignee of illicit articles which have been shipped on board without the knowledge of the insurer. The insured being the master and not owner of the vessel could not refuse to take such goods. *De Peyster v. Gardner, 1 Caines' Rep. 492.*

30. When it is understood by the parties to the contract of insurance that the trade for which the voyage insured is undertaken is illicit by the laws of the country to which the vessel is destined, the warranty against *contraband goods* must be considered as relating to such goods only as are *contraband of war*, and not to such as are contraband as against the laws of that country. *Vandervoort v. Smith, 2 Caines' Rep. 155.*

31. Under a warranty against seizure *on account of illicit trade, &c.*, the underwriters are liable for a loss by illicit trade barratrously carried on by the master. *Suckley v. Delafield*, 2 *Caines' Rep.* 222. *See post*, 35.

32. An insurance was effected on sugar from Antigua to New-York, *warranted free from loss arising in consequence of seizure or detention for any illicit or prohibited trade*. Vessels were allowed to take sugar from *A.* upon special permission, and on certain conditions which in this case were complied with before the loading of the vessel commenced. During the lading of the vessel an order was issued revoking the permission without any exceptions. The vessel notwithstanding, in consequence of an opinion of the president of *A.*, was allowed to clear with her sugar. On her voyage homeward she was captured by a British cruiser, carried in, and the cargo of sugar was condemned for a breach of the laws of trade; *It was held*, that the exportation of the sugar was illicit, and that in consequence the warranty was violated. *Tucker v. Juhel*, 1 *Johns. Rep.* 20.

33. The warranty *against prohibited trade* protects the insurer from a loss arising in consequence of the vessel not being permitted an entry at her port of destination on account of such trade. *Suydam v. The Marine Ins. Co.*, 1 *Johns. Rep.* 181.

34. A warranty against *any loss by seizure and detention, &c.*, extends only to partial losses oc-

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casioned by a seizure or temporary detention which is not followed by a condemnation. *Johnson v. Ludlow*, 1 *Caines' Cases in Error*, xxix. Same case, 2 *Johns. Cases*, 481.

35. The underwriter is liable for damages which may be sustained in consequence of the seizure and detention of a vessel and cargo by reason of prohibited goods found on board but belonging to the master, and shipped by him for the purpose of being smuggled, notwithstanding the warranty in the policy that *the assurer shall be free from charge in consequence of seizure or detention, for or on account of any illicit or prohibited trade*. *Dunham and Wadsworth v. The American Ins. Co.*, 2 *Hall's Superior Court Rep.* 422. In Error to the Supreme Court, 12 *Wendell's Rep.* 463. In the Court of Errors, 15 *Wendell's Rep.* 9.

36. Though a neutral cannot lawfully carry on a trade between the mother country of a belligerent and its colonies, where such trade was not allowed during the previous peace, yet the penalty of forfeiture on account thereof can attach only during the existence of such unlawful trade, and cannot affect or vitiate a subsequent lawful voyage; for the moment the illicit trade is abandoned the party reassumes his neutral character and privileges. *Kemble and Governeur v. Rhinelander*, 3 *Johns. Cases*, 130.

36<sup>a</sup>. Where, during the existence of an act of Congress which prohibited intercourse with France and her dependencies, a vessel was compelled to

put into a French port in distress, and part of her cargo was taken out for the purpose of repairing her, and nearly all her provisions were taken by the government, which prohibited the relading any part of the cargo, and permitted the balance to be bartered for the produce of the place only, and of which the cargo insured consisted; *It was held*, that this was not an illegal trade. The acts of the party were acts of necessity and compulsion, and the law of Congress cannot reasonably be construed to apply to a case of this description. Its object was to prevent an intentional or *voluntary* traffic, and not to compel a sacrifice of property, or inflict a penalty in cases of distress or necessity. *Jenks v. Hallett*, 1 *Caines' Rep.* 60. In Error, 1 *Caines' Cases in Error*, 43. See APPENDIX, 8, 204, 215, 240, 241, 242.

#### 4. OTHER WARRANTIES.

37. An open policy of insurance was effected on a cargo of hides *at and from New-York to Amsterdam*. The policy was dated July 7, 1807, and contained a memorandum at the bottom which, besides the character of the property, warranted *that the property thereby insured was not imported by the exporters*. The ship sailed from New-York on the 30th of July, 1807, on the voyage insured, and was captured by a British privateer and carried into Plymouth. On the 27th of September of the same year the hides were condemned by the High Court of Admiralty in England *as belonging to the*

*enemies of Great Britain or otherwise subject and liable to confiscation.* The hides had been originally exported from Montevideo for American merchants, and an export duty was paid to the officers of the *Spanish* government. Prior to the sailing of the vessel from Montevideo, after she was ready for sea, the place was taken by a British squadron, and the vessel was obliged to pay an export duty to the officers of the *British* government. On her arrival in New-York the hides were sold to American merchants, who shipped them as above in an American vessel with a *certificate of origin* signed by the French consul in New-York, which declared that *they were purchased and exported from Montevideo prior to the capture of that place by the British.* It appeared that this certificate was a *usual and customary* document on board of *American* vessels bound to France and Holland, and one which was required by the decrees of those countries to insure an entry; *It was held*, that having this paper on board was not a breach of the warranty; that the insured did not thereby undertake to warrant against the consequences of the importation of the hides from *Montevideo*, any further than that they themselves were not the importers. *Le Roy et al. v. The United Ins. Co.*, 7 *Johns. Rep.* 343.

38. Where an insurance was effected on a vessel *at and from New-York, until she should be safely arrived at Nantz.* At the foot of the policy, which bore date the 10th December, 1807,

was a written memorandum, in which it was warranted, among other things, *free from seizure or detention in port*. In the course of the voyage, on the 10th January, 1808, the vessel was visited by two British cruisers, who endorsed her register with a prohibition to proceed to any port in France or its dependencies. Having encountered a heavy gale of wind in the vicinity of *Belle Isle* she went there to procure a pilot, and was chased by a *British* schooner under the lee of the island. But not being compelled to show her papers, she was permitted to proceed, and arrived at *Belle Isle* on the 29th January. Having taken a pilot on board she lay to under the protection of the fort, being apprehensive of the *English* cruisers, two of which were then lying off each end of the island. She remained in this situation for about an hour as the fog was so thick that she could not proceed,) being about one league from the shore and thirty miles distant from *Nantz*,) when she was taken possession of by an armed boat from *Belle Isle*, carried in under the guns of the fort, and there claimed as prize. She was subsequently condemned under the Milan decree of the 17th December, 1807, for having been visited by a *British* cruiser; *It was held*, that this was not *a seizure or detention in port* within the meaning of the warranty. That the insurers were liable for a total loss, and that the stopping at *Belle Isle* could not be considered a deviation. *Walton v. The Marine Ins. Co.*, 7 *Johns. Rep.* 57. *See DEVIATION*, 9, note.

39. Where the policies contained the clause in writing, that *the insurers take no risk of a blockaded port, but if turned away, the assured to be at liberty to proceed to a port not blockaded*; the underwriter was held to be protected from every loss which might happen in consequence of a blockade, whether such blockade was strictly legal or not. *Radcliffe v. The United Ins. Co.*, 7 Johns. Rep. 38. *Same case*, 9 Johns. Rep. 277. See APPENDIX, 363, 364.

40. A vessel was insured against capture only, *warranted free from seizure in any river, port, or place under the jurisdiction of Napoleon, or under the jurisdiction of any power under his control or in alliance with him*. On arriving within the jurisdiction of *Holland* (which was then under the control of or in alliance with Napoleon,) with the intention of putting into *Amsterdam*, she was captured and carried into *Amsterdam*, and thereafter condemned by the *Court of Prizes at Paris* for a violation of the *Berlin and Milan Decrees*; *It was held* that the term *seizure* in the warranty was not to be restricted to a seizure for a breach of any municipal regulation, but was to be construed, in this instance, as synonymous with capture; and inasmuch as the capture or seizure was made in a place excepted in the warranty, the insurers were discharged. *Black v. The Marine Ins. Co.*, 11 Johns. Rep. 287. See DEVIATION, 9, note.

41. Where a vessel having negroes on board was insured to *Havana*, and the policy contained

*a warranty free from loss if not permitted to an entry in consequence of having negroes on board.* In conformity with a regulation of the place she was obliged to stop before entering the inner harbor at *Havana*, until permission could be obtained to land the slaves, and was lost while arrangements were making to obtain such permission ; *It was held*, that the meaning and intention of the warranty was to guard against the consequence of not being permitted to an entry *at the custom-house*, and as the same had not been refused at the time the loss happened, the event intended to be provided against by the warranty had not occurred, and the insured was entitled to recover for a total loss. *Dickey v. The United Ins. Co.*, 11 Johns. Rep. 358.

42. Goods were insured on board of an American ship *from Norfolk to Cadiz, warranted free from British and American capture and detention, but the usual sea-risks to continue both during capture and after liberation.* The vessel had on board of her a British license, but was stopped at the mouth of the Chesapeake by a British blockading squadron, and ordered back to Norfolk under penalty of capture and condemnation. She accordingly returned, and the voyage was subsequently given up ; *It was held*, that this was a loss occasioned by detention of the British within the meaning of the warranty. *Wilson v. The United Ins. Co.*, 14 Johns. Rep. 227.

43. Where a vessel is *warranted British*, gene-

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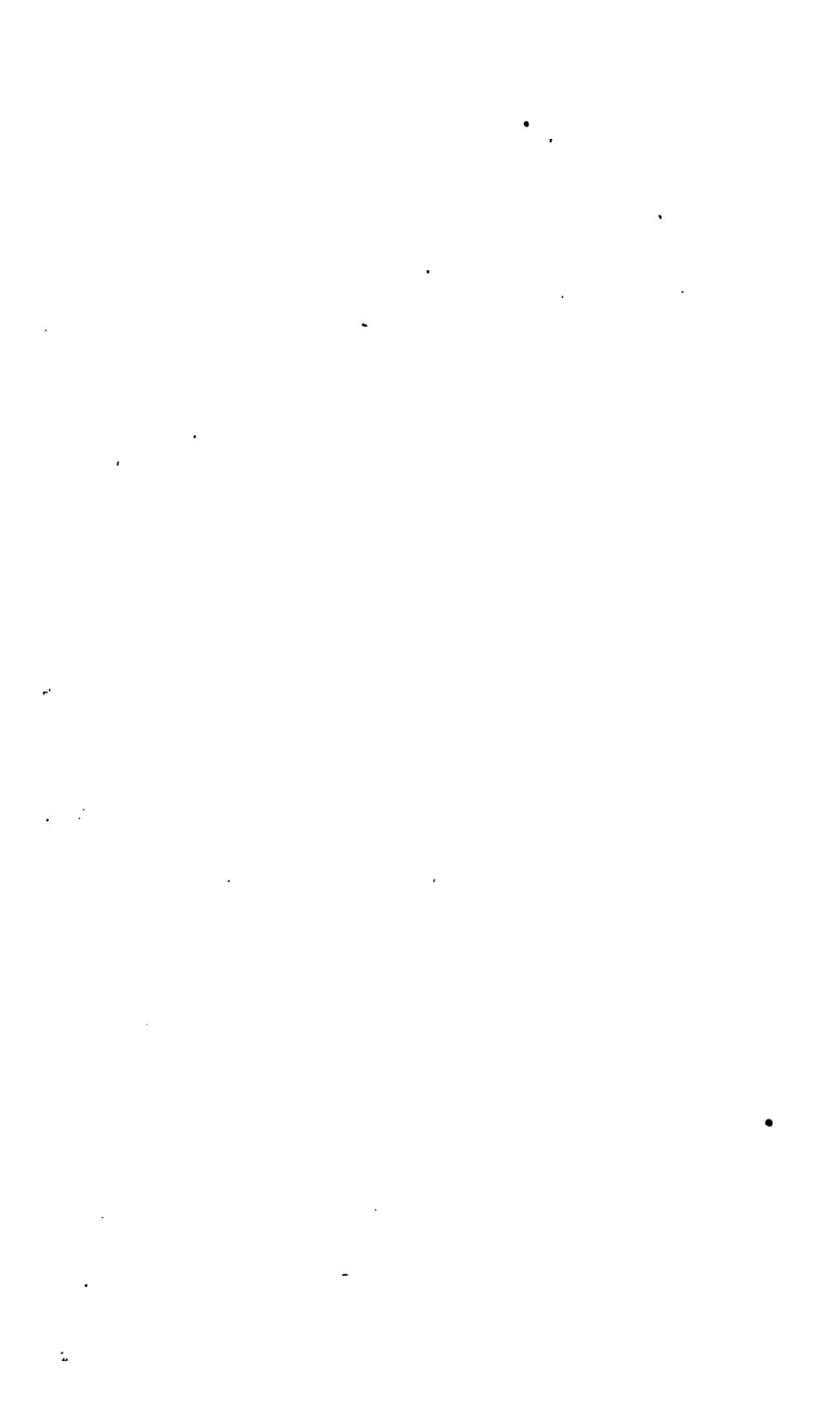
ral evidence of her national character is sufficient until doubts are raised by proofs on the other side. *The Ocean Ins. Co. v. Francis*, 2 *Wendell's Rep.* 64.

44. A *passport* granted by any particular government to protect against its own cruisers, is not sailing under the protection of the flag of that government, so as to stamp a neutral character on the vessel. *Hallett v. Peyton*, 1 *Caines' Cases in Error*, 43.

45. Where a vessel is insured on time, the warranty of seaworthiness is complied with, if at the commencement of the risk she is in an unexceptionable condition, the fact that subsequently she sustained damage, and was not repaired properly at an intermediate port, will not discharge the insurer from subsequent risk or loss, *provided* such loss was not the consequence of such omission. *The American Ins. Co. v. Ogden*, 20 *Wendell's Rep.* 287.

46. The warranty extends only to the acts of the insured, or of those acting with his knowledge or consent. *The American Ins. Co. v. Dunham*, 12 *Wendell's Rep.* 463. See ABANDONMENT, 64, 65. APPENDIX, 170, 269.

**A P P E N D I X.**



## A P P E N D I X .

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1. WHERE an insurance is effected on a vessel for a certain specified period, at a settled rate per cent. *as interest shall appear*, the premium is to be augmented and diminished according as the cargo is changed from time to time during the term for which the insurance is effected. *Pollock v. Donaldson*, 3 *Dallas*, 510.

2. In case of a double insurance, where the whole loss has been paid by the underwriters on the first policy, they are entitled to recover from subsequent underwriters a rateable proportion, so as to divide the loss equally among all the underwriters on the same risk, without regard to the dates of the respective policies. *Thurston v. Koch*, 4 *Dallas*, 348.

3. If a vessel is prevented from entering any of the ports which she is permitted by the policy to enter, and is compelled to terminate her voyage at a port or place to which she had been ordered by a vessel of war, the voyage is broken up, and the insured may abandon to the underwriters. *Symonds v. The Union Ins. Co.*, 4 *Dallas*, 417. 2 *Condy's Marshall on Insurance*, 564<sup>a</sup>, note, 93.

4. One who has a lien on the cargo of a vessel for advances and engagements, may cover his interest by an insurance on the goods. *Russel v. The Union Ins. Co.*, 4 *Dallas*, 421. 2 *Condy's Marshall on Insurance*, 706.

5. The obligation of abandonment in case of loss is an inseparable incident to the right of insurance, and upon an abandonment the underwriters acquire all the rights of the insured. *Ibid.*

6. The insured should communicate to the underwriters the nature of his interest in the subject insured, although it need not be specified in the policy. And where no such communication is made, and the party has only a special interest and not the principal ownership, if this circumstance makes a material difference in the risk, or would have altered the amount of the premium, the omission will vitiate the policy. *Ibid.* 1 *Condy's Marshall on Insurance*, 105, note 7, and 465<sup>a</sup>, note 70.

7. Where a vessel which has been insured by a prior policy is captured, and after condemnation is purchased at a reduced value by the master, for the original owners, and insured on an open policy on her voyage home, the insured may recover the real value of the ship at the time when she was insured, he is not concluded by the price at which she was purchased. *Snell v. The Delaware Ins. Co.*, 4 *Dallas*, 430.

8. Under a clause in a policy of insurance that the insurers are not liable for seizure by the Por-

*tuguese for illicit trade*, the underwriters will be discharged from the loss, if the vessel should be seized and condemned by the Portuguese for an attempt to trade illicitly. *Church v. Hubbart*, 3 *Cranch*, 187.

9. A detention at sea to save a vessel in distress, is such a deviation as will discharge the underwriters, and the owner stands his own insurer. *Mason et al. v. The Blireau*, 2 *Cranch*, 240, 269.

10. A policy in the name of one joint-owner *as property may appear*, and which does not contain a clause stating the insurance to be for the benefit of all concerned, will not cover the interest of another joint-owner. *Graves, &c. v. The Boston Marine Ins. Co.*, 2 *Cranch*, 419.

11. The policy, though construed liberally, is still a *special contract*, and under no rules for proceeding on a special contract can the interest of a copartnership be given in evidence on an averment of individual interest, or the averment of the interest of a company be supported by a special contract relating in its terms to the interest of an individual. *Ibid*, 440.

12. Each partner has the power to insure the joint property. *Ibid.*

13. The evidence of the knowledge of the underwriters of the intention of the insured, ought to be very clear, in order to justify a court of equity in varying the terms of a policy so as to make it conform to that intention. *Ibid.*

14. Where a policy upon a vessel contained the clause that *if the vessel, after a regular survey, shall be condemned for being unsound or rotten, the underwriters shall not be bound to pay the subscription on this policy*; *It was held* that a report of surveyors that she was unsound and rotten, but which did not refer to the commencement of the voyage, was not sufficient to discharge the insurers. *The Marine Ins. Co. of Alexandria v. Wilson*, 3 Cranch, 187.

15. *Quære*, Whether such report, even if it related to the commencement of the voyage would be conclusive evidence. *Ibid.*

16. Where a vessel was insured *at and from Kingston in Jamaica to Alexandria*, and she took in a cargo at Kingston for Baltimore and Alexandria, and sailed with an intent to go first to Baltimore, and from thence to Alexandria, and was captured before she arrived at the dividing point, *it was held* to be a case of intended deviation only, and not a case of non-inception of the voyage insured. *Marine Ins. Co. of Alexandria v. Tucker*, 3 Cranch, 357.

17. And an *intended deviation* will not vitiate a policy, the vessel remains covered by her insurance not only until she reaches the point of divergency, but until she actually turns off from the course of the voyage insured. *Ibid*, 384, 393.

18. The ordinary rule by which to ascertain the identity of the voyage insured is to advert to the *termini*. *Ibid*, 385.

19. If a vessel is insured *at and from a place*, the risk commences during her stay in port, and if afterwards she should sail on an entirely different voyage, although the insurer would be discharged, yet there can be no return of premium. *Marine Ins. Co. of Alexandria v. Tucker*, 3 *Cranch*, 357.

20. If the vessel sails from the port mentioned in the policy with an intention to go to a port or ports also described in the policy, a determination to call at an intermediate port either with a view to land a cargo, or for orders, or the like, is not such a change of voyage as to prevent the policy from attaching. But if the intention is carried into effect, or persisted in after she shall have arrived at the dividing point, it is a deviation. *Ibid*, 390, 391.

21. Whenever the insured receives notice of a loss, it becomes incumbent on him to elect whether he will abandon or not, and if he intends to abandon, to give notice of such intention to the underwriters. *Ibid*, 394.

22. In case of capture and recapture, where the two events are communicated before an election to abandon has been actually communicated to the underwriters, an abandonment will not be sanctioned; yet it is equally true that in case of capture, a recapture alone will not deprive the insured of his right to abandon. The consequences of the capture and recapture, and the effects produced on the fate of the voyage, must govern the rights of the parties. This effect is always a mat-

ter of evidence, and must rest much in the discretion of the jury. *The Marine Ins. Co. of Alexandria v. Tucker*, 3 *Cranch*, 386.

23. If a vessel should be captured and recaptured, it will depend on the circumstances of the case whether the loss shall be regarded as total or partial. It is a question of law depending on the fact whether, on the whole evidence, the voyage was broken up or not. *Ibid*, 357.

24. The capture of a neutral as prize by a belligerent is a total loss, and entitles the insured to abandon. *Rhinelander v. The Ins. Co. of Pennsylvania*, 3 *Cranch*, 29.

25. The state of the loss at the time when the offer to abandon is made fixes the rights of the parties. *Ibid*.

26. To constitute a right to abandon there must have existed a total loss, occasioned by one of the perils insured against, but this total loss may be either real or legal. *Ibid*.

27. A capture from one belligerent by another constitutes a total loss in the technical sense of the phrase, and gives the insured an immediate right to abandon to the insurers, although the vessel may be afterwards recaptured or restored. *Ibid*, 42.

28. An embargo or detention by a foreign friendly power constitutes a total loss, and warrants an immediate abandonment. *Ibid*, 42, 43.

29. The contract of insurance is a contract of indemnity, and therefore the insured can recover

only according to the damage he has sustained. *Rhinelander v. The Ins. Co. of Pennsylvania*, 3 *Cranch*, 45.

30. The right of the insured to abandon and recover for a total loss, depends on the state of the fact at the time of the offer to abandon, and not upon the state of the information received. *Marshall v. The Delaware Ins. Co.*, 4 *Cranch*, 202.

31. The technical total loss arising from capture ceases with a final decree of restitution, although such decree may not have been executed at the time the offer to abandon is made. *Ibid.*

32. A policy upon a ship is an insurance of the ship for the voyage, it is not an insurance on the ship and the voyage. The underwriters undertake for the ability of the vessel to perform the voyage, not that she shall perform it at all events. *Alexander v. The Baltimore Ins. Co.*, 4 *Cranch*, 370.

33. And the loss of the voyage as respects the cargo is not a loss of the voyage as to the ship. *Ibid.* *Church v. The Marine Ins. Co.*, 1 *Mason*, 341.

34. If at the time when the offer to abandon is made, the ship is in possession of the master, in good condition, and at full liberty to proceed on her voyage, the loss of the cargo will not entitle the owner to recover as for a total loss of the ship. *Ibid.* 4 *Cranch*, 370.

35. A general policy, insuring any person having an interest in the thing insured, and which contains

no warranty that the property is neutral, covers belligerent as well as neutral property. *Hodgson v. The Marine Ins. Co. of Alexandria*, 5 *Cranch*, 100.

36. A misrepresentation which is not averred to be material will be no bar to an action on the policy; for to have such an effect it is necessary that it be material to the risk of the voyage. *Ibid.*

37. Where the insurance is against *all risks, blockaded ports, and Hispaniola excepted*, a vessel sailing ignorantly for a blockaded port is protected by the policy. *Yeaton v. Fry*, 5 *Cranch*, 335.

38. The exception contained in the policy is not of the port, but of the risk of capture for breaking the blockade. It is not a warranty. The words are those of the insurer, not of the insured; and they take a particular risk out of the policy, which but for the exception would be comprehended in the contract. *Ibid.*

39. Policies of insurance are generally the most informal instruments that are brought into courts of justice, and there are no instruments that are more liberally construed in order to effect the real intention of the parties, where such intention can be clearly ascertained. *Ibid.*

40. If a vessel sails to a port within the policy with intent to go to a port not within the policy in case the former should be blockaded, this is not a deviation pending the voyage to the first port. *Maryland Ins. Co. v. Woods*, 6 *Cranch*, 29.

41. Where a policy was from *Baltimore to La-guira, with liberty of one or other neighbouring*

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*port, and at and from them, or either of them, back to Baltimore; It was held that the port of Amsterdam in Curracoa was a neighbouring port within the policy, inasmuch as the distance between the two places was inconsiderable, and there was no stipulation express or implied, that the neighbouring port should be under the same government. Ibid.*

42. The policy of insurance is very loosely drawn, and a settled construction, different from the natural import of the words, is given by the commercial world to many of its stipulations, which construction has been sanctioned by the decisions of courts. *Ibid, 45.*

43. An attempt to enter a blockaded port is a breach of the warranty of neutrality, and will discharge the underwriters. *Ibid.*

44. In an action on a policy of insurance effected on property warranted neutral, *proof of which to be required in the United States only*, a sentence of condemnation in a foreign Court of Admiralty, upon the ground of a breach of blockade, is not conclusive evidence of a breach of neutrality. *Ibid, 29.*

45. Where an insurance was on *freight at and from Philadelphia to the Isle of France*. While in the prosecution of her voyage, the vessel was arrested by a British cruiser, and her papers were endorsed with a warning to her *not to proceed to any port in possession of his majesty's enemies*, and the captain, who was also the owner, was at the same time verbally informed by the boarding offi-

cer that the port of her destination was blockaded, and that the vessel would be good prize if she proceeded thither, and under these circumstances she returned to her port of departure, where an abandonment was made, stating the circumstances as cause. On her arrival the act of Congress of the 22d of December, 1808, laying an embargo was in force, and prevented the renewal of her voyage. It appeared on the trial that the *Isle of France* was not in fact blockaded at the time she was warned away; *It was held*, that inasmuch as the voyage was broken up from fear founded on misrepresentation, and the vessel was not physically incapacitated from proceeding, and as there was no legal impediments, the underwriters were not liable. *King v. The Delaware Ins. Co.*, 6 *Cranch*, 71. 1 *Condyl's Marshall on Insurance*, 81<sup>b</sup>, note.

46. Whether the voyage was broken up? and whether the captain was justified in returning? are questions of law, and if the jury find the facts specially, and draw the legal conclusion that the facts amount to a justification, they pass upon matters to which they are incompetent, and the court is not bound by their conclusion. *Ibid.*

47. The British orders in council of November 11th, 1807, did not prohibit a direct voyage from the United States to a colony of France; the language of the orders, the understanding of both countries publicly and officially expressed, are conclusive on this point. *Ibid.*

48. In an action upon a valued policy it is not competent for the underwriters to give parol evidence that the value of the subject insured is different from that stated in the policy. *The Marine Ins. Co. of Alexandria v. Hodgson*, 6 *Cranch*, 206.

49. The agent who effects the insurance for his principal, has authority to abandon without a formal letter of attorney. *The Chesapeake Ins. Co. v. Stark*, 6 *Cranch*, 268.

50. The informality of a deed of cession to the underwriters is unimportant, if the abandonment is unexceptionable the property vests in them immediately, and the deed is not essential to the rights of either party. *Ibid.*

51. If the abandonment is legal it puts the underwriters completely in the place of the insured, and the agent of the latter becomes the agent of the underwriters. *Ibid.*

52. An abandonment must be made within a reasonable time. But what is a reasonable time is a question compounded of law and fact, which must be found by a jury under the direction of the court. *Ibid. The Maryland Ins. Co. v. Ruden's Adm'r.*, 6 *Cranch*, 338. *Livingston et al. v. The Maryland Ins. Co.*, 7 *Cranch*, 506.

53. A special verdict is defective if it does not find whether the abandonment was made in a reasonable time. *Ibid.*

54. If the interest of one joint-owner of a cargo is insured, and if that interest is neutral, it is no

breach of the warranty of neutrality if the other joint-owner whose interest is not insured is a belligerent. *Livingston and others v. The Maryland Ins. Co.*, 6 *Cranch*, 274.

57. For the insured are not understood to warrant that the whole cargo is neutral, but only that the interest insured is neutral. *Ibid.*

56. If the insured represents that the whole cargo is neutral, or if the interest of a belligerent is concealed when it ought to be disclosed, the effect of such representation or concealment upon the policy will depend on its materiality to the risk, which question must be decided by a jury under the direction of the court. *Ibid.* 279. *The Maryland Ins. Co. v. Ruden's Adm'r.*, 6 *Cranch*, 338.

57. That alone can be a warranty which is introduced into the policy. *Ibid.*

58. The right to abandon may be kept in suspense by mutual consent. And where an agreement to that effect contains no limitation as to time, it is at least to continue while the property remains in its then situation unless it is sooner determined by one of the parties. The insured might still abandon, and the underwriter might at any time require him to elect immediately whether to abandon or to waive his right to do so. *Ibid.*

59. If a vessel takes papers on board which materially enhance the risk, and it is not within the regular usage of the trade insured to take such papers, the not disclosing the fact that they would

be on board will vitiate the policy. *Ibid.* *Livingston v. The Maryland Ins. Co.*, 7 *Cranch*, 506, 537.

60. The discharge of the underwriters from their liability where an additional cargo is taken on board which is not authorized by the policy, depends not on any supposed increase of risk, but is founded wholly on the principle of the departure of the insured from the contract of insurance; it is a deviation. *The Maryland Ins. Co. v. Le Roy*, 7 *Cranch*, 26.

61. The consequences of such a violation of the contract are immaterial to its legal effect, it is *per se* a discharge of the underwriters, the law attaches no importance to the degree in cases of voluntary deviation. *Ibid.*

62. Necessity alone can justify a deviation in any way, and that deviation must be strictly commensurate with the *vis major* producing it. *Ibid.*

63. A policy of insurance on a vessel *at and from an island*, protects her while sailing from port to port in the island in order to take in a cargo. *Dickey v. The Baltimore Ins. Co.*, 7 *Cranch*, 327.

64. Strictly speaking, a vessel is not *at an island* while she is sailing from one port to another of the same island, yet it is difficult to resist the persuasion that an insurance *at and from an island*, means something more than an insurance *at and from a port*. *Ibid.*

65. If in an action on a valued policy, a mis-

representation as to the age and tonnage of the vessel, by which the underwriter was induced to agree to a high valuation, is a defence ; it is such at law and not in equity. *The Marine Ins. Co. of Alexandria v. Hodgson*, 7 *Cranch*, 332.

66. Where the vessel and cargo were captured, and the cargo was abandoned to the underwriters as a total loss, and the abandonment was accepted by them and the loss paid, and the cargo was condemned, and restored upon an appeal, and the proceeds thereof were paid to the underwriters ; *It was held*, that the underwriters to the policy on the cargo were not liable for freight *pro rata itineris* to the owner of the vessel, who was also owner of the cargo insured. *Caze et al. v. The Baltimore Ins. Co.*, 7 *Cranch*, 358.

67. As between the insured and the underwriter on the cargo of a ship, the latter is in no case responsible for the payment of freight, whether there has been an abandonment or not. It is a charge upon the cargo against which he does not undertake to indemnify the owner. *Ibid.*

68. The existence of a lien on the cargo for freight, will not vary the legal responsibility of the underwriter, after an abandonment. *Ibid.*

69. Where there is a loss of part of a cargo which consists of articles declared in the memorandum of the policy to be *free from average unless general*, and which articles are all of the same kind, such loss cannot be total, it is only a partial

loss. *Braig v. The Chesapeake Ins. Co.*, 7 *Cranch*, 415.

70. And the underwriters are not liable for *salvage* upon such articles, under the clause which authorizes the insured to *labor and travel* for the preservation of the cargo, unless perchance in a case when the salvage may have prevented a total loss of the cargo. *Ibid.*

71. This clause in the policy can be understood to apply only to those losses or injuries for which the assured would have been responsible if they had happened. *Ibid.*

72. The length of time which a vessel may wait to take in her cargo does not depend upon the usage of trade. *Oliver v. The Maryland Ins. Co.*, 7 *Cranch*, 487.

73. The danger which will justify a vessel for remaining in port a long time, without discharging the underwriters, must be obvious, immediate, directly applied to the interruption of the voyage, and imminent, not distant, contingent or indefinite. *Ibid.*

74. Where, according to the usage of trade, a vessel is permitted to go from one port to another to collect her cargo, and unnecessarily exhausts at one port the whole time allowed according to the usage of trade to complete her cargo, she cannot go to the other port without being guilty of a deviation. *Ibid.*

75. What is a reasonable apprehension of damage to excuse such deviation, is a question of

law to be decided by the court. *Oliver v. The Maryland Ins. Co.*, 7 *Cranch*, 487.

76. To constitute a representation in effecting an insurance, there must be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion. *Livingston et al. v. The Maryland Ins. Co.*, 7 *Cranch*, 506.

77. In estimating the materiality of papers on board of a vessel in enhancing the risk, their effect when taken together should be considered, and not the effect of any one of them by itself. *Ibid*, 538, 546.

78. If the letter ordering the insurance and submitted to the underwriters, refers to another letter previously laid before them, which contained information that the vessel had permission to trade to the Spanish colonies, the underwriters are bound to notice that fact, and to know that the vessel would take all the papers necessary to render the voyage legal. *Ibid*.

79. If the insured does any act which according to the common practice of the belligerent increases the risk of capture and detention, it may avoid the policy, it is not necessary that the act done would justify a condemnation according to the law of nations. *Ibid*.

80. No acts can have the effect to avoid the policy which are justified by the usage of trade, and done by the insured to avoid confiscation. *Ibid*.

81. It is questionable whether it is ever neces-

sary for the insured to declare the national character of other distinct interests engaged in the same adventure, unless they are called for by the underwriter. *Livingston et al. v. The Maryland Ins. Co.*, 7 *Cranch*, 343. *STORY, Justice.*

82. The warranty of neutrality extends not barely to the fact of the property being neutral, but also that the conduct of the voyage shall be such as to protect and preserve its neutral character. If the papers are denied to a belligerent, and the property is thereby put in jeopardy, such conduct constitutes a breach of the warranty. *Ibid*, 544.

83. The belligerent right of search draws after it a right to the production and examination of the ship's papers. *Ibid.*

84. The question must always be whether there was a concealment of papers material to the preservation of the character of neutral. It is not every idle, accidental, or every meditated concealment of papers manifestly unimportant before the prize tribunal, which will dissolve the obligation of the policy. If by the usage or course of trade it is necessary or allowable to have on board spurious papers, covered with a belligerent character, whatever effect it might have upon the searching cruiser, the concealment of such papers as if disclosed would completely compromit or destroy the neutral character, will not amount to a breach of the warranty. *Ibid* 545. *Per STORY, Justice.*

85. Whenever the underwriter has knowledge of and assents to the cover of neutral property

under belligerent papers, as he does in all cases where the usage of trade demands it, he necessarily waives his right under the warranty, or in other words, he authorizes the concealment in all cases where it is not necessary to assume the belligerent national character for the purposes of protection. *Livingston et al. v. The Maryland Ins. Co.*, 7 *Cranch*, 545, *per Story, Justice*.

86. The public laws of a country, affecting the course of the trade with that country, are considered to be equally within the knowledge and notice of all the parties to a policy on a voyage to such country. *Ibid*, 547, *per Story, Justice*.

87. Where a technical total loss is sought to be maintained on the mere ground of the deterioration of the cargo to a moiety of its value at an intermediate port, all deterioration of *memorandum* articles must be excluded from the estimate. *Marcardier v. The Chesapeake Ins. Co.*, 8 *Cranch*, 39.

88. Therefore where the cargo is of a mixed character, no abandonment for mere deterioration in value during the voyage can be valid, unless the damage on the non-memorandum articles exceeds a moiety of the whole value of the cargo, including the memorandum articles. *Ibid*.

89. Barratry is an act committed by the master or mariners of the ship, for some unlawful or fraudulent purpose, contrary to their duty to their owner, whereby the latter sustains an injury. *Ibid*.

90. It follows from the very terms of this definition that barratry cannot be committed by a master who is owner for the voyage, because he cannot commit a fraud against himself. *Marcardier v. The Chesapeake Ins. Co.*, 8 *Cranch*, 39.

91. Where a cargo is insured by sundry policies, in some of which the rate of exchange at which the prime cost of the cargo shall be valued is fixed, in ascertaining the amount of the insured's interest in settling those policies on which the rate of exchanges is fixed, the whole cargo is to be valued at the same rate of exchange without regard to the rate of exchange by which the value may have been ascertained in other policies. *Pleasants v. The American Ins. Co.*, 8 *Cranch*, 55.

92. Where a policy is against *unlawful arrests, restraints, and detainments of all kings, princes, &c.*, the qualification *unlawful* in its operation extends as well to restraints and detainments as to arrests, and in such a case a detainment by a force lawfully blockading a port, is not a peril insured against by a policy containing a warranty of neutrality. *McCall v. The Marine Ins Co.*, 8 *Cranch*, 75.

93. An insurance on goods *to be safely landed at Leghorn* is discharged by landing them at the *lazaretto*, that being the usage of the trade. *Gracie v. The Marine Ins. Co. of Baltimore*, 8 *Cranch*, 75.

94. The termination of the voyage as to the ship, does not necessarily terminate the risk as to

the goods ; this may continue after the voyage as to the ship is ended. Its determination depends on the intention of the parties, which must be looked for in their contract. *Gracie v. The Marine Ins. Co. of Baltimore*, 8 *Cranch*, 75.

95. The insurer on *memorandum articles* is liable only in case of a total loss, which can never take place where the cargo, or a part of it, has been sent on by the insured and arrives at the original port of destination. *Moreau v. The United Ins. Co.*, 1 *Wheaton*, 519.

96. If the loss should be in reality total, or such as the insured is permitted to treat as total, he may abandon and recover for a total loss on *memorandum articles*, with the exception that he is not permitted to turn a partial into a total loss. *Ibid.*

97. The loss of the voyage by capture, shipwreck, or otherwise, may be treated as a total loss, subject to this distinction. *Ibid.*

98. Where a ship was cast on shore near the port of destination, and the agent of the insured employed persons to unlade as much of the cargo as could be saved, and nearly one half was landed in a damaged condition, and sent on to the place of destination, and sold by the consignees at about one fourth of the price of the sound article, *it was held* that this was not a total loss, and that the insurer was not liable. *Ibid.*

99. Insurance was effected on a vessel and freight *at and from Teneriffe to the Havana, and*

*at and from thence to New-York, with liberty to stop at Matanzas, with a representation that the vessel was to stop at Matanzas to know if there were any men-of-war off the Havana.* The vessel sailed on the voyage insured, and put into Matanzas to avoid British cruisers, which were then off the Havana and were in the practice of capturing neutral vessels which were bound from one Spanish port to another. While at Matanzas she unladed her cargo under an order from the Spanish authorities, and afterwards proceeded to Havana, whence she sailed on her voyage to New-York, and was thereafter lost by the perils of the sea. It was proved that the stopping and delay at Matanzas were necessary to avoid capture, that no delay was occasioned by discharging the cargo, and that the risk rather than being increased was diminished; *It was held*, that the order of the Spanish government was issued under circumstances such as to furnish no excuse for discharging the cargo, but that the stopping and delay at Matanzas were permitted by the policy, and that the unlading of the cargo was not a deviation. *Hughes v. The Union Ins. Co.*, 3 Wheaton, 159.

100. To entitle the plaintiff in an action on a policy to recover, the loss must be occasioned by one of the perils insured against. The insured cannot recover for a *lose by barratry* unless the barratry occasioned the loss, yet it is immaterial whether the loss so produced occurred during the continuance of the barratry or afterwards. *Swan*

v. *The Union Ins. Co. of Maryland*, 3 *Wheaton*, 168.

101. A vessel in a port which becomes blockaded after the commencement of her voyage, prevented thereby from proceeding thereon, sustains a loss by a peril within that clause in the policy which insures against *arrests, restraints, and detainments, &c.*, for which the underwriters are liable. And if the vessel so prevented is a neutral, and has on board a neutral cargo, which was laden before the blockade was instituted, the restraint is unlawful. *Oliveira v. The Union Ins. Co.*, 3 *Wheaton*, 183.

102. A technical total loss must continue up to the time when the abandonment is made, not merely that it should then be known to exist, but that it must then actually exist. *Ibid.*

103. Where in an action on a policy of insurance a technical total loss is assigned as the ground of recovery, the loss must have been occasioned by the immediate operation of some of the perils insured against, and it is not sufficient that the voyage has been abandoned *for fear of* the operation of the peril. *Smith v. The Universal Ins. Co.*, 6 *Wheaton*, 176. *See ante*, 45.

104. The insurers do not undertake that the voyage shall be performed without delay, or that the perils insured against shall not occur; they undertake only for losses sustained by those perils, and if any peril should begin to act upon the subject, but is removed before any loss takes place,

and the voyage is not broken up by it, but is or may be resumed, the insured cannot recover for a total loss. *Smith v. The Universal Ins. Co.*, 6 *Wheaton*, 176.

105. If a vessel is captured during a voyage, and is afterwards recaptured, and performs, or may perform her voyage, the insured cannot abandon for a technical total loss after such recapture. *Ibid.*

106. Where a policy contained the clause *and lastly it is agreed that if the above vessel, upon a regular survey, should be thereby declared unseaworthy by reason of her being unsound or rotten, then the assurers shall not be bound to pay their subscriptions on the policy.* It was found by the jury that the vessel was seaworthy at the time of the commencement of the risk, and when she sailed on the voyage insured; *It was held*, that proof of unsoundness at any subsequent period of the voyage would discharge the underwriters. *Dorr v. The Pacific Ins. Co.*, 7 *Wheaton*, 581.

107. An exemplification of the condemnation of a vessel in a foreign court of Vice-Admiralty, reciting the surveyor's certificate that the vessel was unworthy to be repaired, and unfit ever to go to sea again, produced in evidence by the insured to prove the loss, is a *regular survey* within the meaning of such a clause. *Ibid.*

108. But it is necessary that the survey should correspond with the contract, for if the vessel is declared unseaworthy for any other or additional

cause besides being *unsound or rotten*, it will not be available to the insurers. *Dorr v. The Pacific Ins. Co.*, 7 *Wheaton*, 581.

109. An insurance broker has a lien upon the policy for the premium paid by him on account of his principal, and although he may have parted with it out of his possession, yet if it again passes into his hands his lien is revived and protected, *provided* the manner in which it was first parted with has not manifested an intention on his part to abandon such lien altogether. *Spring v. S. C. Ins. Co.*, 8 *Wheaton*, 268.

110. But liens for other advances, or on other accounts, whether by agreement of the parties, or by the operation of usage or of law, will not be revived by the return of the policy to the hands of one who has previously had possession thereof and parted with it. *Ibid.*

111. If a *bona fide* assignment of the policy is made for a valuable consideration, while it is out of the possession of the insurance broker, it would be unjust if its returning to his possession should revive incumbrances of which the assignee could have had no notice, or no certain means of ascertaining. *Ibid.*

112. An insurance for \$18,000 was effected on a vessel which was valued at that sum, and \$2000 on freight which was valued at \$12,000, on the ship *Henry*, *at and from Teneriffe and at and from thence to New-York, with liberty to stop at Matanzas; the property warranted American.*

The policy was executed in 1807. In the same year another insurance was effected by the same underwriters, on freight for the same voyage, to the amount of \$10,000, and the property was also *warranted American*; but this policy contained no permission to stop at Matanzas. A representation was made to the underwriters on behalf of the plaintiff as follows; *we are to clear out for New-Orleans, the property will be under cover of Mr. John Paul, of Baltimore, who goes supercargo on board, yet Mr. P. will only have part of the cargo to his consignment. There will be three other persons on board, who will have the remainder of the cargo in their care. We are to stop at Matanzas to know if there are any men-of-war off the Havana.* The vessel sailed from Teneriffe on the 17th of April, 1807, with a cargo belonging to Spanish subjects, but appearing to be the property of *John Paul Dumeste*, a citizen of the United States, and the same person who was called *John Paul* in the representation. The cargo was shipped under a charter-party executed by the plaintiff and Dumeste, and representing New-Orleans as the place of destination. The ship arrived at the Havana on the 7th of July, (having put into Matanzas to avoid British cruisers,) and unloaded her cargo, which was there received by the Spanish owners, and the freight amounting to \$7000 was paid to the plaintiff, who received it *in full of all demands for freight, or otherwise, under and by virtue of the aforesaid charter party and*

*cargo.* At the Havana the ship took in a new cargo belonging to merchants in New-York. She was lost, with the greater part of her cargo, on the voyage from Havana to New-York. An action of debt was brought on the first policy for the value of the ship and freight. The sum demanded in the writ was \$20,000, but at the trial the plaintiff limited his demand to \$18,000 on the ship, and \$420 for the freight actually earned on the voyage from Havana to New-York; *It was held*, that he was entitled to recover. *Hughes v. The United Ins. Co. of Baltimore*, 8 Wheaton, 294.

113. Where a policy contained the clause, *it is declared and understood that if the above mentioned brig, after a regular survey, should be condemned for being unsound or rotten, the insurers shall not be bound to pay the sum hereby insured, or any part thereof.* A survey was made by the master and wardens of the port of New-Orleans, which was obtained at the instance of the master, who was also part owner, and was transmitted by him to the other part owner, who laid it before the underwriters as proof of the loss. The survey stated that the wardens *ordered one streak of plank fore and aft to be taken out, about three feet below the bends on the starboard side, and found the timber and bottom plank so much decayed, that we were unanimously of opinion her repairs would cost more than she would be worth afterwards, and it would be for the interest of all concerned she should be condemned as unworthy of re-*

*pair on that ground; we did therefore condemn her as not sea-worthy, and as unworthy of repair, and therefore, according to the power vested by law in the master and wardens of this port, we do hereby order and direct the aforesaid damaged brig to be sold at public auction for the account of the insurers thereof, or whomsoever the same may concern; It was held, that under the circumstances, this survey was conclusive evidence to discharge the insurers under the foregoing clause contained in the policy. Janny v. The Columbia Ins. Co., 10 Wheaton, 411.*

114. An insurance was effected to the amount of \$10,000 upon a voyage *at and from Alexandria to St. Thomas and two other ports in the West Indies, and back to her port of discharge in the United States, upon all lawful goods and merchandise laden or to be laden on board the ship, and beginning the adventure on the said goods and merchandise from the lading at Alexandria, and continuing the same until the said goods and merchandise shall be safely landed at St. Thomas, &c., and the United States aforesaid; It was held, that this was an insurance upon every successive cargo taken on board in the course of the voyage, out and home, so as to cover the risk of a return cargo, the proceeds of the outward cargo. The Columbian Ins. Co. v. Catlett, 12 Wheaton, 383.*

115. Such a policy will cover property to the amount of \$10,000 during the whole voyage, out and home, so long as the insured has that amount

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v. *The Union Ins. Co. of Maryland*, 3 *Wheaton*, 168.

101. A vessel in a port which becomes blockaded after the commencement of her voyage, prevented thereby from proceeding thereon, sustains a loss by a peril within that clause in the policy which insures against *arrests, restraints, and detainments*, &c., for which the underwriters are liable. And if the vessel so prevented is a neutral, and has on board a neutral cargo, which was laden before the blockade was instituted, the restraint is unlawful. *Oliveira v. The Union Ins. Co.*, 3 *Wheaton*, 183.

102. A technical total loss must continue up to the time when the abandonment is made, not merely that it should then be known to exist, but that it must then actually exist. *Ibid.*

103. Where in an action on a policy of insurance a technical total loss is assigned as the ground of recovery, the loss must have been occasioned by the immediate operation of some of the perils insured against, and it is not sufficient that the voyage has been abandoned *for fear of* the operation of the peril. *Smith v. The Universal Ins. Co.*, 6 *Wheaton*, 176. *See ante*, 45.

104. The insurers do not undertake that the voyage shall be performed without delay, or that the perils insured against shall not occur; they undertake only for losses sustained by those perils, and if any peril should begin to act upon the subject, but is removed before any loss takes place,

*deduction except the amount of the premium if then unpaid, and it is hereby agreed that the insured shall not abandon to the insurers until sixty days have elapsed after having given them notice of his intention to do so, and of the loss or the event which may entitle the insured thereto ; the insured on receiving notice of the loss, may give notice of the loss and of his intention to abandon in such a manner that it shall operate as an abandonment at the expiration of the time stipulated.* The first foregoing clause can only apply to a case where there has been a loss and also an adjustment, if the loss is disputed the provision can have no application. *The Columbia Ins. Co. v. Catlett, 12 Wheaton, 383.*

119. According to the general principles of the law of insurance, upon an abandonment being made for a technical total loss, in due season, the insured acquires an immediate right of recovery against the underwriters. He is not bound to wait until they signify their acceptance or refusal of the abandonment if it is valid, nor is he bound to wait for payment if it is accepted, he may at once commence an action against them. *Ibid.*

120. It is not necessary to aver in the declaration that any preliminary proofs of the loss were offered to the underwriters, nor of any promise to pay in sixty days after such proofs, according to the terms of the policy, further than the general averment, after the allegation of the loss, that the defendants on, &c., at &c., had notice thereof, and

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by means thereof became liable, &c., and in consideration thereof promised that they would pay the same *according to the tenor and effect of said policy of insurance.* *The Columbia Ins. Co. v. Catlett,* 12 *Wheaton*, 383.

121. Nor is the averment of an abandonment or of notice to the underwriters necessary ; they are but matters of evidence. *Ibid.*

122. Where an insurance was effected after a loss had happened which was not known to the insured, and it appeared that the master had omitted to communicate information to the owner, and had expressed his intention not to write to the owner, and taken measures to prevent the fact of the loss from being known for the avowed purpose of enabling the owner to effect an insurance, in consequence whereof information of the loss had not reached the parties at the time when the policy was underwritten ; *It was held*, that inasmuch as the owner acted in good faith he was entitled to recover. *The General Interest Ins. Co. v. Ruggles,* 12 *Wheaton*, 408.

123. As a general rule it is not true that either the fact of loss, or the knowledge of such fact by the agent or the principal at the time of procuring the policy, will render it void, such knowledge must be brought home to some of the parties or agents connected with the business of procuring the insurance, and then the rule properly applies which puts the principal in the place of the agent, and makes him responsible for his acts. *Ibid.*

124. A master has no authority in his character as master to procure an insurance, nor is he in any sense an agent for such purpose, or in any way connected with it. *The General Interest Ins. Co. v. Ruggles*, 12 *Wheaton*, 408.

125. If the policy authorizes a vessel to stop at a particular port, it is not necessary for the assured to disclose that the ship will call there, although he may have information of the fact. *Hubbard v. Coolidge*, 2 *Gallison*, 353.

126. It is incumbent on the insured to disclose all the facts in his possession which are material to the risk, and which are not contained or implied in the policy itself, but he may with innocence be silent as to facts which the policy necessarily imports. *Ibid.*

127. It is sufficient if a representation as to the destination of a vessel is true at the time when it is made, if the same is not made fraudulently, although another destination should ultimately be given. *Ibid.*

128. Where the insured stated to the underwriters in reply to some general inquiries, *that they had no knowledge the ship would call at the Cape, and knew of no motive for calling there, &c.*, and showed the letter containing the only information which they possessed on the subject, *it was held* not to be a misrepresentation, although the letter might be considered as implying an intention to stop at the Cape. *Ibid.*

129. A policy of insurance is a maritime con-

tract, and is therefore within the expression of *causes of admiralty and maritime jurisdiction*, and within the cognizance of courts of admiralty. *De Levio v. Bott et al.*, 2 *Gallis*. 398, 475.

130. But courts of common law have concurrent jurisdiction over questions arising under policies of insurance. *Ibid.*

131. The construction, as respects the time when a policy *at and from* a port attaches, depends upon circumstances. If the vessel is in a foreign port in the course of a voyage, the policy attaches upon her first arrival there. If she is in a domestic port, then the risk attaches from the date of the policy. If she has been for some time in port, without reference to any particular voyage, it attaches from the time of commencing preparations for the voyage insured. If the insured becomes owner while she is lying in port, the policy attaches from the time when his ownership commences. *Seaman v. Lowing, et al.*, 1 *Mason*, 127.

132. A policy *for A. B., or whom it may concern*, which is effected by an agent, without any warranty or representation of national character, will cover the interest of any person whether American or foreigner, who may have authorized the insurance. *Ibid.*

133. A person who has a lien for advances, or a special ownership and possession, may protect his interest in the ship and cargo to the extent of the

same, by an insurance on the vessel and cargo.  
*Ibid.*

134. The underwriter is exonerated by the usual clause as to prior insurances, where prior insurances have been actually made by the insured on the same voyage to the full value of the vessel and cargo, and are in full force at the time, notwithstanding such prior insurances are cancelled by a subsequent agreement between the insured and such prior underwriters before the risk is commenced. *Seaman v. Lowing et al.*, 1 *Mason*, 127.

135. The underwriter is discharged if the policy is *at and from* and the insured unreasonably delays to commence the risk, inasmuch as such delay amounts to a non-inception of the voyage insured. *Ibid.*

136. In order that a policy may not be void for want of an insurable interest, the insured must have an interest subsisting at the time when the policy according to its terms would attach, such an interest subsequently acquired will not avail. *Ibid.*

137. Where a vessel was stranded, and afterwards, but before an abandonment, was gotten off without material injury, and in the intermediate time was sold by the master at public auction, and purchased by him; *It was held*, that the plaintiff was not entitled to recover as for a total loss. *Church v. The Marine Ins. Co.*, 1 *Mason*, 341.

138. Where a voyage is retarded by an accident, it is no ground for an abandonment for a

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total loss. *Church v. The Marine Ins. Co.*, 1 *Mason*, 341.

139. A vessel armed as a *letter of marque*, and insured as such, has no right to cruise at large for prizes, but may chase and capture hostile vessels coming in sight in the course of her voyage without being chargeable with a deviation. And there is no difference in the law if the vessel is not described in the policy as a *letter of marque*, *provided* the fact is made known to the underwriters before the policy is executed. *Haven et al. v. Holland*, 2 *Mason*, 230.

140. If a vessel should capture a hostile vessel in self-defence, she will have a right to make her conquest effectual by taking possession of her prize and manning her, and this will not amount to a deviation unless her own crew be thereby injuriously weakened. *Ibid.*

141. A policy was underwritten, \$1000 *on brig Union*, and \$4000 *on effects on board of said brig, from Salem to port or ports in the West Indies, one or more times, for the purpose of selling her outward and procuring a return cargo, and at and from thence to her port of discharge in the United States*. The memorandum for insurance contained the clause, *the Union is bound to Kingston, Jamaica; if not allowed to sell there will proceed to Cuba*. At the time when the insurance was effected both parties were under the impression that the port of Kingston was open to American vessels, under a proclamation of the governor, nor

did either of them contemplate any illicit trade. The Union went to Kingston under the supposition that the port was open, and was there seized and condemned for the illicit trade ; *It was held*, that the underwriters were not liable for the loss, that if the omitted clause of the memorandum had been inserted in the policy, it would not have altered the nature of the insurance, or the liability of the underwriters. *Andrews v. The Essex Fire and Marine Ins. Co.*, 3 *Mason*, 6.

142. The omitted clause was not, in the contemplation of the parties, a part of the contract intended to be inserted in the policy, but amounted only to a representation of the fact. *Ibid.*

143. A Court of Admiralty has jurisdiction over policies of insurance as maritime contracts, but not over contracts leading to policies. It cannot reform a policy by the antecedent contract ; this matter properly belongs to a Court of Equity. *Ibid.*

144. Where two policies are of the same date, in order to entitle themselves to an exoneration from the payment of a loss, under the common clause as to an insurance by *prior* policies, the parties may show the actual time when each policy was executed, and the policy first executed is alone to bear the loss, *provided* it covers the whole interest. *Potter v. The Marine Ins. Co.*, 2 *Mason*, 475.

145. But where two policies are concurrently executed, the operation of the priority clause is excluded, and the insured may recover his whole

loss upon either policy and the other underwriters are liable only for contribution. *Potter v. The Marine Ins. Co.*, 2 *Mason*, 475.

146. Where a policy was executed on a ship and cargo, *at and from Leghorn to her port of discharge in the United States*. She sailed on her voyage, being owned in and bound to *Salem*. In March, 1820, she was cast away on a ledge of rocks near to *Portsmouth* and immediately bilged. She was in such a desperate situation that the chances were *as nine to one* that she would be totally lost in twenty-four hours, and the owners abandoned to the underwriters who made no verbal acceptance of the abandonment, but declined any further agency of the owners and sent their own agent to take possession of the vessel, and to sell her if he thought best, and in all respects to act as he chose in reference to the vessel, but not to meddle with the cargo, (*specie*,) which had not been abandoned. The owners gave up the ship to the exclusive possession of the agent of the underwriters, after the abandonment. In consequence of extraordinary good weather, and good fortune, she was got off and carried to *Portsmouth* in about a week. She was found to be injured to about one half of her value, and the necessary repairs could not be made within three months, which was a longer period than the usual length of the voyage insured. After she was got off the underwriters offered to return her to the owners, but they refused to receive her. They then repaired

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her and again offered her to the owners who still refused to accept her, and who did not at any time interfere with the repairs, but adhered to their abandonment; *It was held* that, 1. Under the circumstances, the owners had a good right to abandon, though the injury was less than one half the value. 2. In estimating that half value, there was not to be the deduction of one third *new for old* as in cases of partial loss, but the half value which authorized the abandonment, was one half of the sum which the ship would be worth if repaired, and if when repaired she would not be worth double the amount of repairs, the owners had a right to abandon. 3. That the insurers had no right to take possession of the ship, either to remove or repair her, without the consent of the owners, and that the acts of taking possession, &c., after the abandonment was made, were in construction of law an acceptance of it, inasmuch as those acts were not justifiable unless the underwriters were considered owners of the property under the abandonment. 4. That an abandonment once duly made and accepted is irrevocable by either party without the consent of the other. *Peele et al. v. The Merchants' Ins. Co.*, 3 Mason, 27.

147. The right to abandon exists whenever the ship, for all the purposes of the voyage, from the peculiar circumstances of the case, is for the present gone from the control of the owner, and the time when she may be restored to him in a state

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to resume her voyage is uncertain or unreasonably distant, or the risk and expenses are disproportioned to the benefit expected and the objects of the voyage. In such a case, although she may have a physical existence, the law deems the ship as ceasing to exist for any purposes of utility, and therefore subjects her to be treated as lost. *Peele et al. v. The Merchants' Ins. Co.*, 3 *Mason*, 27.

148. If in procuring an insurance the agent represents that the vessel would not sail until four days after another vessel which came from the same port, and had arrived, when in point of fact she had sailed four days before, and the difference in her time of sailing is material to the risk, the policy is void. *Baxter v. The New-England Ins. Co.*, 3 *Mason*, 96.

149. A vessel was insured *from Messina to Boston*. Meeting with disasters in the course of the voyage she put into *Lisbon* for repairs, which were made and exceeded half her value. A bottomry bond was given for the amount, and she proceeded on her voyage and arrived at her destination in safety. Not having information thereof her owner abandoned four days after her arrival, and she was subsequently sold under the bottomry bond; *It was held*, that the loss was not total at the time of the abandonment; and that, in this case, the underwriter was entitled to have the usual deduction for repairs of one third *new for old*, as the sale of the vessel was by the default of the

owner. *Humphreys v. The Union Ins. Co.*, 3 *Mason*, 429.

150. The contributory value of freight to a general average, is ascertained by a deduction of one third of the gross freight. *Ibid.*

151. The actual cost of repairs at its true value, and not the cost estimated at so much *per milrea* in a depreciated currency, is the rule by which the underwriter is to pay for repairs. *Ibid.*

152. In case of an insurance on cargo composed principally of *lemons and oranges*, if the whole of the oranges are lost on the voyage by any of the perils insured against, and the lemons are saved and reach their destination, the underwriter is protected under the usual memorandum which warrants the insurer *free from particular average on fruit, &c.*, and is not liable for the loss of the oranges. *Ibid.*

153. An averment that the plaintiffs have an entire interest in themselves, in the subject insured, is not supported by proof of a joint interest with others. *Catlett et al. v. The Pacific Ins. Co.*, 1 *Paine*, 594.

154. Neither is an averment of joint interest with others sustained by proof of a separate interest. *Ibid.*

155. Four persons made each a separate purchase of the *moiety* of a cargo, which was specie, and instructed their agent to get it insured on their joint account. The agent effected the insurance, but it was expressed to be *on account of owners*.

Subsequently one of them transferred half of his interest to the person who was to go out in the vessel as supercargo ; *It was held*, that the term *owners* was descriptive of the persons intended to be insured, and as it referred to matters out of the policy, was open to explanation by extrinsic proof. *Catlett et al. v. The Pacific Ins. Co.*, 1 *Paine*, 594.

156. As the underwriters understood when making the insurance, that it was on account of the plaintiffs only, they could not set up that the supercargo became an owner before the commencement of the risk. *Ibid.*

157. The bill of lading on its face, and other papers, showed that the interest of the three owners, after shipment, was joint, but there was an endorsement on the bill of lading which stated that half of the cargo was the property of one, and that the other half belonged to the other two, and *it was held* that the endorsement was intended merely to show the extent of each owner's interest, and that the separate purchase of the cargo together with the endorsement did not prove their interests to be several. *Ibid.*

158. Where the *voyage* was broken up before it terminated, and the insured on receiving information of the fact, abandoned. The instructions to the master and supercargo showed that the rights and duties of the latter in that capacity, were not to commence until the *voyage* was completed. Upon the loss of the *voyage* the master

delivered the specie to the agent of the supercargo, and it was invested in cotton ; *It was held*, that inasmuch as the supercargo was not interested in the policy, his acts did not bind the other joint owners ; that his capacity of supercargo suspended whatever powers he might have had as partner, and that the investment of the specie was made by him as agent for the underwriters, and did not amount to an act of ownership such as to waive the abandonment. *Catlett et al. v. The Pacific Ins. Co.*, 1 *Paine*, 594.

159. The custom of insurance offices to pay only *two thirds* of the gross freight, and to deduct *one third* to cover the charges upon the freight, in case of loss on an open policy of insurance on freight, is in direct opposition to the terms of the policy, and is in itself unreasonable, inasmuch as it would make no distinction between long and short voyages. It cannot therefore furnish a legal rule, particularly unless it is clearly proved to have been generally known, or known to the agent of the insured who effected the insurance. *M'Gregor v. The Ins. Co. of Pennsylvania*, 1 *Washington's C. C. Rep.* 39.

160. Where a vessel commences her voyage at one port, and is insured while she is in another, into which she put in distress, and where she is repairing, it will not vitiate the policy to state that the voyage is from the latter port unless it is material, the insurance being free from average. *Kohne v. The Ins. Co. of N. America*, 1 *Wash. C. C. Rep.*

93, 123, 158. 1 *Cond's Marsh. on Ins.*, 461, *note 69—473, note 75.*

161. A policy of insurance executed under an agreement made between the parties after a loss, but before such loss was known to either of them, although it may not be delivered, is nevertheless valid, and the insured may recover upon it. *Ibid.*

162. If the insured omits to communicate a circumstance material to the risk, whether such omission is the result of fraud or by accident, it will vitiate the policy. *Ibid.*

163. In taking the risk there is always an implied condition that the underwriter shall be equally informed with the insured as to all the facts within his knowledge, and that he shall have the same opportunity for measuring the extent of the danger, as well as be enabled to judge of the compensation. *Ibid.*

164. The underwriter is supposed to be equally informed with the insured as to public transactions, foreign laws or ordinances, the course and nature of the trade, &c., by which the risk may be affected, *provided* the same are generally known; and in such case it is not necessary to bring home a knowledge of them to the insured. *Ibid.*

165. The underwriter is not bound to inquire into facts which he may suppose material to the risk,—without previous information of the circumstances he would not know what inquiries would be pertinent. *Ibid.*

166. Where goods were described by mistake

as marked in a particular memorandum, when in fact the mark was different, and it was mentioned by the broker at the time when the insurance was effected, that it was doubtful whether the description of the marks was correct, but that whether correct or not, the intention was to insure certain goods mentioned in a letter then shown ; *It was held*, that as the identity of the property was clearly made out, and no imposition could have taken place, the insured was entitled to recover. *Ruan v. Gardner*, 1 Wash. C. C. Rep. 145. 1 *Condy's Marsh. on Ins.*, 317, note 46. *Ibid.* 2, 564<sup>a</sup>, note 93—680, note 112, 706<sup>b</sup>.

167. When the policy is not under seal, an action may be brought upon it in the name of the principal, though the agent only is named therein. And the courts of the United States will entertain jurisdiction where the principal is a citizen of a different state from that of the defendant, although the agent is of the same state. *Ibid.* 2 *Condy's Marsh. on Ins.*, 680, note 112. *Beale v. Pettit et al.*, 1 Wash. C. C. Rep. 241.

168. It is the duty of underwriters to know the course of the trade which they undertake to insure. It is not for them to object that the insured has not disclosed what they themselves knew, or ought to have known. *Calbraith v. Gracie*, 1 Wash. C. C. Rep. 198, 219. 1 *Condy's Marsh. on Ins.*, 388<sup>a</sup>, note.

169. A person who is part owner, and ship's husband, may insure the whole cargo ; if however

the property is *warranted American*, and the joint owners are *Spanish*, the warranty is violated. *Calbraith v. Gracie*, 1 Wash. C. C. Rep. 198, 219. 1 *Condy's Marsh. on Ins.*, 388<sup>a</sup>, note.

170. In the above case a policy was effected *on goods at and from Havana to Cartagena, and at and from thence to Philadelphia, with leave to touch at Laguira and one or more ports on the Spanish Main and the West India Islands, warranted American property, proof whereof to be made in any of the courts of the United States, if questioned.* The vessel was captured by a *French* privateer on her voyage to *Cartagena*, and recaptured by a *British* privateer, and carried into a *British* port and libelled as enemy's property. A claim was put in by H., a Spaniard, who, by the charter-party had been constituted supercargo and consignee of the cargo, and was appointed to manage the concerns of the owners. He swore that the cargo belonged to himself, a subject of the King of Spain, and the vessel to another person who was also a subject of the King of Spain, and claimed restitution on the ground of a treaty lately concluded between *England and Spain*. Spain was then at peace with England, but at war with France. The property was finally condemned on the ground of reciprocity, (no such treaty appearing,) as Spain did not restore the property of a friend taken from an enemy; *It was held*, that under the clause in the policy, the condemnation was not conclusive in our courts to falsify the war-

ranty, which the insured was still at liberty to vindicate, but the underwriters might read the proceedings in evidence although they were not conclusive. *That* inasmuch as the loss and condemnation of the property was attributable solely to the conduct of the supercargo, the agent of the insured, and that too by an unfounded claim and false allegations in direct opposition to the warranty, when, if he had stated the truth, restoration would have been decreed, the underwriters were discharged. *That* the allegation that an American on board was the real captain, and the only agent of the insured, but did not make any claim in his behalf, could not avail the plaintiff, for it was his duty to make such claim, and his omission to do so is the same as if by his acts he had produced the condemnation. *That*, by the warranty of American or neutral property, the insured engages that it shall not lose that character during the voyage insured, by any act or omission of the insured or any of his agents; and further that it should have all the necessary documents to establish its neutrality, if questioned, which are required by treaties or the law of nations. *Calbraith v. Gracie*, 1 Wash. C. C. Rep. 198, 219. 1 *Condyl's Marsh. on Ins.*, 406<sup>b</sup>, note.

171. If notice of a capture is received by the insured before condemnation, he ought to make his election within a reasonable time to abandon, or to consider the loss as partial, because wherever there exists a *spes recuperandi* he ought not to lay

by and treat it as a total or a partial loss, as events may turn out, and thus deprive the insurer of saving what he can. *Calbraith v. Gracie*, 1 Wash. C. C. Rep. 198, 219. 2 *Condy's Marsh on Ins.*, 599<sup>o</sup>, note.

172. The rule laid down is, that where there is a capture, the insured may abandon at once and recover for a total loss, and leave the *spes recuperandi* to the underwriter, who will have the benefit of any accident by which the thing may be recovered. But he must make his election whether to abandon or not within a reasonable time after notice of the loss. *Ibid.* *See post*, 179.

173. And where the insured received intelligence of the capture on the 10th of July, and did not abandon until December; *It was held* to be too late, and that although the underwriters may be notified of the capture, they are not bound to hasten the assured in making his election, nor offer to pay before it is demanded. *Ibid.*

174. In an action on an open policy of insurance the plaintiff must prove his interest and the value of it, before he can recover. *Beale v. Pettit*, 1 Wash. C. C. Rep. 241.

175. In an action on a policy, the plaintiff cannot recover for a loss sustained in a manner variant from that set forth in the declaration, as where the loss was averred in the declaration to have happened by *French* spoliation; *the Court held*, that the plaintiff could not recover for a loss occasioned by the embezzlement of the crew,

*Hicks v. Fitzsimmons*, 1 Wash. C. C. Rep. 279.

176. Whether a fact concealed by the insured is material to the risk or not, is a question of fact to be submitted to the determination of a jury. *Vale v. The Phenix Ins. Co.*, 1 Wash. C. C. Rep. 283.

177. If the insured knows, or has been informed at what time his vessel is to sail, it may be very material to the risk that he should disclose the fact, and if it should be material, and is not disclosed, the policy is void. *Johnson v. The Phenix Ins. Co.*, 1 Wash. C. C. Rep. 378. *1 Condy's Marsh. on Ins.*, 470, note 74.

178. If there is any particular information in possession of the insured respecting a gale, which is likely to enhance the danger, and it is materially different from any information which is possessed by the insurer, and is such as he was not bound to know, the concealment of it will vitiate the policy. *Moses v. The Delaware Ins. Co.*, 1 Wash. C. C. Rep. 385.

179. Within a reasonable time after having received notice of a loss, the insured must make his election whether or not to abandon, and give notice of the abandonment, if such is his determination. *Hurtin v. The Phenix Ins. Co.*, 1 Wash. C. C. Rep. 400, 530. *See post*, 263.

180. And it must depend on circumstances, to be judged by the jury, what is a reasonable time. He may wait a reasonable time to ask for advice

and information to enable him to make up his mind whether he may legally abandon, and other circumstances may exist which will excuse some delay, but this delay must be *bona fide* and not with a view to speculate on events. *Hurtin v. The Phenix Ins. Co.*, 1 Wash. C. C. Rep. 400, 530.

181. A formal instrument of cession is not necessary or essential to vest the property in the underwriter. The abandonment itself amounts to a legal transfer of the rights of the insured so as to enable the underwriters to pursue the property as effectually as if a regular deed had been made to them ; and consequently the refusal to make such a cession will not affect an abandonment already made and accepted. *Ibid.* 2 *Condy's Marsh. on Ins.*, 601<sup>c</sup>, note.

182. Notwithstanding that a reasonable time is allowed within which to make the abandonment, if the insured declares that he does not mean to abandon, and communicates such intention to the insurers, he cannot thereafter abandon. *Ibid.*

183. The underwritten cannot abandon, where the same letter which brings information of a capture gives also information of the release of the vessel. *Ibid.*

184. Where an abandonment is made, the underwriters are entitled to all the proceeds of the effects abandoned, and if they are sold and the amount is invested in other things to a profit by the agent of the insured, they are also entitled to

that profit. *Ibid.* 2 *Condy's Marsh. on Insurance*, 611, *note*.

185. Where a vessel has been captured and carried in, and permitted to sell her cargo, the expenses which may have been incurred during such detention are general average. But expenses incurred in the repair of the vessel are not general average, they are chargeable only to the ship. *Ibid.*

186. An insurance was effected *on goods from New-York to Gibraltar*. The vessel was captured and carried into *Algeziras* by the Spaniards, where the supercargo was required to sell, or give security not to carry the property to any British port in the Mediterranean, and in consequence sold the cargo ; *It was held*, that the insured might abandon. *Ibid.* 2 *Condy's Marsh. on Ins.*, 601<sup>c</sup>, *note*.

187. Where the language of the policy of insurance is express and plain, the contract cannot be varied by reference to the order for insurance. *Hogan v. The Delaware Ins. Co.*, 1 *Wash. C. C. Rep.* 419. 1 *Condy's Marsh. on Ins.*, 345<sup>c</sup>, *note*.

188. Where the plaintiff was bound to have an insurance effected for the defendant, and neglected to do so ; *It was held*, that he became himself the insurer, and that the claim against him for the omission was one which might be made the subject matter of a set-off. *De Tastet v. Crouisillat*, 1 *Wash. C. C. Rep.* 504. 1 *Condy's Marsh.*

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*on Ins.*, 301, note 42. *2 Condy's Marsh. on Ins.*, 694<sup>a</sup>, note. See post, 243.

189. The foundation of an open policy is the real value of the thing insured, and in estimating the real value of merchandise, the *invoice price* is a proper criterion; but where the real value is not susceptible of being proved in any other way, the *prime cost* of the articles will furnish the rule. *Snelt v. The Delaware Ins. Co.*, 1 Wash. C. C. Rep. 509.

190. In an action founded on the incapacity of the vessel to prosecute the voyage on account of damage sustained from stress of weather, the warrant of survey and report are a judicial proceeding, and in writing, and parol proof of their contents is inadmissible, though the facts contained in the survey may be proved by other evidence than the report. The statute or written law of foreign countries should be proved by the law itself. The *unwritten* law may be proved by witnesses. *Robinson v. Clifford*, 2 Wash. C. C. Rep. 1. *1 Condy's Marsh. on Ins.*, 159<sup>a</sup>, note. *2 Condy's Marsh. on Ins.*, 706<sup>a</sup>, note.

191. Where the terms contained in the order directing the insurance have been departed from in the policy, either by fraud or mistake, a court of equity will consider the order as containing the true terms of the contract, if the variation in the policy is material; but if the terms of the order and instructions, are not manifestly variant from those contained in the policy, and especially where

the insured swears in his answer that the policy contains the real contract as he intended it, equity will not interfere. *The Delaware Ins. Co. v. Hogan*, 2 Wash. C. C. Rep. 4.

192. An insurance on goods *at and from New-York to the Cape of Good Hope, with liberty to proceed to, and trade at, the Isle of France, and thence to any other port or ports in the Indian seas, and at and from the ports she might go to, back to New-York, with liberty to touch and trade as usual for refreshments, on the outward and homeward voyage.* The ship touched at the *Isle of France*, and went thence to *Trincomalee*, and thence to *Madras*, where she sold part of her cargo, and received an order on *Tranquebar*, where she took in goods purchased with the order, and proceeded thence to *Batavia*, where she sold the balance of her original cargo as well as that taken in at *Tranquebar*, and invested the proceeds in a return cargo. The first and second officers having died, the captain on his death-bed, being then on his return voyage, directed the crew to take the vessel to the *Isle of France*, and deliver her to the American consul, which was done. After the death of the captain, the crew in council determined that it was expedient to make for the *Isle of France*. On her arrival there the correspondent of the plaintiff claimed possession, which was decreed however, to the American consul, who procured a survey, and thinking the vessel over-loaded, sold part of her cargo and put in a lighter load. He

also put a *British* subject on board as captain, and the vessel was lost on her return; *It was held*, 1, That the permission to trade at the Isle of France ought to be carried forward to the ports in the Indian Seas, that this trading was not limited to the mere act of selling the outward cargo, but covered repeated acts of buying and selling, and that the acts of trading stated did not amount to a deviation. 2. That the going to the Isle of France, inasmuch as it was from necessity and for the benefit of all concerned, generally, was justifiable. 3. That the consul acted in his official capacity and within the sphere of his duty, and not as agent of the plaintiff. That the insured were not bound by the acts of third persons, performed in consequence of a misfortune occurring in the course of the voyage, which misfortune alone, and not the act of the insured or his agent, gave to such third person a right to interfere. That the changing the cargo at the Isle of France, if it could be imputed to the insured, would have avoided the policy because it would have varied the risk. *Winthrop v. The Union Ins. Co.*, 2 Wash. C. C. Rep. 7. 1 *Condy's Marsh. on Ins.*, 203<sup>b</sup>, note.

193. In an action by an agent against his principal for premiums advanced and paid, *It was held*, that the production of the policy containing an acknowledgment of the payment of the premium, in the printed form, was not sufficient to entitle the plaintiff to recover; there must be other and better

proof of the payment of the premium. *Melick v. Peterson*, 2 Wash. C. C. Rep. 31. 2 *Condy's Marsh. on Ins.*, 709, note.

194. Where an action was on a policy containing the common printed memorandum, *salt, wheat, &c.*, are warranted free from average, unless general; and all other goods free from average under five per cent., unless general, and there was also an additional clause in writing which provided that the goods insured (being cotton and sugar) should be free of average under ten per cent.; It was held, that the clauses were inconsistent with each other, but that the written clause should be considered as expressive of the actual understanding between the parties, and that the goods were exempted from all average losses whether general or particular under ten per cent. *Coster v. The Phoenix Ins. Co.*, 2 Wash. C. C. Rep. 51. 2 *Condy's Marsh. on Ins.*, 547<sup>a</sup>, note. See post, 249.

195. An insurance was procured on goods from *Baltimore* to *Jeremie*, with liberty to touch &c., and thence back again to *Baltimore*, and declared to be on certain articles constituting the outward cargo, a few only of which were not enumerated, with an &c. valued at \$12,000, clear of premium, which sum was insured. Another insurance was effected at another office on the return cargo, which was estimated at 125,000 pounds of coffee, and which was valued as respected the risk at 22 cents per pound, and from this valuation was to be

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deducted *the \$12,000 before insured*, which left \$15,500 to be covered by the latter policy. A total loss occurred however, on the homeward voyage, and an offer to abandon was made to both offices, and it was rejected, but the first underwriters subsequently paid the amount of their subscription without an abandonment. The policies contained the usual printed clause as to prior insurance. *It was held*, 1. *That* the first policy on the homeward voyage was an open policy. 2, *That* the second insurers were not bound to look at the first policy, but were authorized to consider it, as it was represented to be, a valued policy. 3, *That* the first policy covered as much of the coffee as \$12,000 would absorb *at prime cost and charges*, and not according to the valuation *of 22 cents per pound*, and that the residue only was covered at that price. 4. *That* the second insurers could not be effected by the subsequent arrangement made by the first, to pay without an abandonment. *McKim v. The Phænix Ins. Co.*, 2 Wash. C. C. Rep. 89. 1 *Condy's Marsh. on Ins.* 152<sup>b</sup>, note.

196. In order to constitute *barratry* the act must be fraudulent and to the prejudice of the owners. If it is fraudulent, it follows as a matter of course that it is a criminal violation of the duty which the master owes to his employers. It is not at all essential that it should be to the interest of the master, if it is so it is an evidence of fraud, and so is gross negligence. Where the question turns merely on the fraud, it will always be necessary to

examine into the motive. Where the act is done to benefit the owner it is an honest, though it may be a mistaken motive, and therefore it cannot be called barratry. The truth of this principle is tested in the case of a wilful deviation, made with the intent to benefit the owner, for if it were made with a view to benefit *the master* it would be barratry. *Dederer v. The Delaware Ins. Co.*, 2 *Wash. C. C. Rep.* 61. 2 *Condy's Marsh. on Ins.*, 534<sup>b</sup>, note.

197. Where the insured in offering to abandon assigns a sufficient ground for doing so, and also states his readiness to furnish the proofs, and the underwriters refuse to accept the abandonment, they cannot afterwards object that he has not communicated to them all the information in his power, or other reasons for his act. *Ibid.* 2 *Condy's Marsh. on Ins.*, 601<sup>c</sup>.

198. In case of capture, when an abandonment has been properly made the property vests in the underwriter by relation to the time of capture, yet the captain continues to be the agent of the insured until the time when the abandonment is made. His acts subsequent to the capture may operate as well to the advantage as the injury of the insured. The clause in the policy which permits him to act for the best for the preservation of the property without prejudice to the insurance, binds the underwriters to submit to the consequences of acts which are performed for the benefit of all concerned, and the introduction of the clause

shows that the captain continues to be the agent of the insured, and if his acts for the common benefit were not sanctioned, he might thereby prejudice the claim of the insured. If his act is a lawful act, it is for the *jury* to determine whether he acted in such a manner as best to promote the interests of all concerned, but no power to do an unlawful act is to be implied from the authority given to him. *Ibid.* 2 *Condy's Marsh. on Ins.* 615<sup>a</sup>, note.

199. If the captain of a neutral vessel which has been captured by a belligerent, attempts to rescue her, it is a sufficient cause for condemnation, inasmuch as it is contrary to the law of nations, and if the attempt to do so is caused by any misinformation given by the captors, it will not, as between the underwriter and the insured, excuse the act. *Ibid.*

200. Where a deviation is made with the view to relieve a vessel in distress and to save the life of man, the humanity of the motive may excuse the act, but if the stoppage is continued after this object is effected, or the risk is increased by adding to the cargo, or diminishing the crew, or by other means, for the purpose of saving the property found, the insurers will be discharged. *Bond v. The Cora*, 2 *Wash. C. C. Rep.* 80. 1 *Condy's Marsh. on Ins.*, 211, note. 2 *Admiralty Decisions*, 361.

201. Where the risk contemplated in the policy never commences there is no contract, and the pre-

mium, which is the price of the risk, must be returned. *Scriba v. The Ins. Co. of North America*, 2 Wash. C. C. Rep. 107. 1 *Cond's Marsh. on Ins.* 247, note. 1 *Hall's Am. Law Journal*, 36.

202. Thus where goods were insured on a voyage *from Vera Cruz to New-York, beginning the adventure from and immediately after the loading of the said goods on board the vessel at Vera Cruz*. The vessel sailed from New-York about two months before the date of the policy, with a cargo insured at other offices out and home. On her arrival at V. C., the government refused to give her permission to land her cargo, or take in any thing, or even to repair, and she left that port with her outward cargo, for New-Orleans, from which place the captain wrote to his owner informing him that he could not dispose of his cargo, and would therefore go to the Havana and sell it, without having particularly mentioned what had occurred at Vera Cruz. On receipt of this letter the insured procured the underwriters to endorse on the policy an agreement that the vessel might go to the Havana, without prejudice to the insurance, for an additional premium of *one half per cent*. *It was held*, that the intention of the policy was to cover such goods only as might be taken on board of the vessel *at Vera Cruz*, and that, consequently, the risk had never commenced—that the memorandum which was endorsed on the policy did not alter the case, inasmuch as it was founded on a mutual mistake, and an impression that the policy had attached, which was not the fact. *Ibid.*

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203. Where the vessel is not sea-worthy at the time when the risk is commenced, and arrives safely at her destination notwithstanding, the underwriter cannot retain the premium. *Ibid.* 1 *Condy's Marsh. on Ins.*, 166, note.

204. Where the property is *warranted by the insured free from any charge, damage or loss, which may arise in consequence of seizure or detention, for or on account of any illicit trade*, the illicit trade and the fact of seizure must both concur in order to constitute a breach of such warranty. *Graham v. The Pennsylvania Ins. Co.*, 2 *Wash. C. C. Rep.* 113. 1 *Condy's Marsh. on Ins.*, 346<sup>a</sup>, note.

205. Where a policy was effected *on goods at and from Philadelphia to Tonningen or Hamburgh, if not blockaded; warranted American property, proof whereof to be made here*. By instructions, which were not communicated to the underwriter, the master was directed to proceed to *T.*, and thence to forward his letters by express to his consignee at *H.* The instructions also contained the clause, *if you can ascertain and obtain permission to go to Hamburgh, from the cruising vessels at the entrance of the Eyder, you will proceed; but on no account attempt it unless you are well assured that the blockade of the Elbe is raised*. The vessel was captured in the channel, and condemned for a breach of the blockade of *H.* by the British; *It was held*, that inasmuch as the mouth of the *Eyder*, where the permission alluded to was to be

procured, was twenty miles from the *Elbe*, and was not invested, and was in the direct course to *Toningen*, to which port the vessel could lawfully go, there was in fact no forfeiture of neutrality; and further, that the concealment of the instructions given to the master was not a concealment immaterial to the risk. *Sperry v. The Delaware Ins. Co.*, 2 *Wash. C. C. Rep.* 243. 1 *Condy's Marsh. on Ins.*, 473<sup>a</sup>, note.

206. A letter of instructions to the master of a vessel, which contains matter which under the principles of *British* courts of admiralty would expose the property to risk, ought to be communicated to the underwriters, and it is immaterial whether these decisions are consistent with the law of nations or not, inasmuch as that circumstance does not affect the danger of capture and loss. *Ibid.* 1 *Condy's Marsh. on Ins.*, 473<sup>a</sup>, note.

207. Where a policy was on goods on a voyage *at and from Kingston to Aruba, and at and from thence back to Kingston, with liberty to touch at Rio de La Hacka*. It was thereafter agreed, for an additional premium, *that the vessel might take in the whole or part of her cargo at Coro, &c.* She sailed on her voyage and tarried about eight days at Aruba, and there she took in a person to assist in the purchase of mules at Coro. She subsequently returned again to Aruba, and during her stay there, which lasted a part of two days, the place was captured by the *Dutch* and the vessel and her cargo were condemned as prize; *It was*

*held*, that the return to Aruba was a deviation, and that the underwriters were in consequence discharged. *Martin v. The Delaware Ins. Co.*, 2 *Wash. C. C. Rep.* 254. 1 *Condy's Marsh. on Ins.*, 186, *note*.

208. In order to excuse a deviation on the plea that it is within the ordinary course of the trade, it is not sufficient to prove one or two instances, it must appear that the course is so uniformly and necessarily pursued as that it ought to be known to the underwriters as well as the insured. *Ibid.*

209. If an accident happens while the property is at the risk of the underwriters, and where it cannot be repaired at the port of departure, the vessel is at liberty to go to the nearest port where the repairs can be made; and it is incumbent on the party claiming the benefit of this rule to show to the satisfaction of the jury, that the port resorted to was in fact the nearest port. *Cruder v. The Philadelphia Ins. Co.*, 2 *Wash. C. C. Rep.* 339.

210. Where a vessel which has not been heard of, is therefore presumed to have been lost, the underwriters will be liable for interest *after twelve months and thirty days* from the time when she was last heard of, that being shown to be the uniform usage in such cases. *Hallett v. The Phenix Ins. Co.*, 2 *Wash. C. C. Rep.* 279. 2 *Condy's Marsh. on Ins.*, 490<sup>a</sup>, *note*.

211. Although the absence of sea-worthiness at the time when the risk commences may not vacate the policy, *provided at the time of commencing the*

voyage the vessel was sea-worthy, yet she cannot go out of her course to supply the want of seaworthiness. As, for instance, if when the risk commences she is not sufficiently manned, she may thereafter and before commencing the voyage supply this deficiency, but she cannot excuse *a deviation* made for the purpose of procuring hands. *Cruder v. The Philadelphia Ins. Co.*, 2 Wash. C. C. Rep. 339. 2 *Condy's Marsh. on Ins.*, 840.

212. And this upon the principle that she ought to have been fitted for the voyage before her departure, in default of which she is not excusable unless she has been prevented by some accident which has occurred since the risk commenced. *Ibid.*

213. The insured must state to the underwriter a sufficient reason for the offer made to abandon, and if he does so it is no objection that he did not mention other reasons. Yet if he gives an insufficient reason, he cannot avail himself at the trial of one not specified in the notice. An opportunity ought to be given to the underwriter to judge whether or not he is bound to accept the offer, in order that he may do so at once if it is incumbent upon him, and take such measures as are necessary for the preservation of the property. *King v. The Delaware Ins. Co.*, 2 Wash. C. C. Rep. 300. 2 *Condy's Marsh. on Ins.*, 601<sup>a</sup>, note.

214. A detention by an embargo which is laid by the American government, of which both par-

ties are subjects, after the policy has attached, is a peril within the description of *arrest, restraint, and detention of princes, &c.*, and is a sufficient ground for an abandonment. *Odlin v. The Pennsylvania Ins. Co.*, 2 Wash. C. C. Rep. 300. 2 *Condyl's Marsh. on Ins.*, 508<sup>a</sup>, note. 2 *Hall's Am. Law Journal*, 221.

215. If the trade between this and any other country is wholly or partially interdicted in relation to particular articles; or if war should break out between this and such other country after the contract is made to carry goods thither, the subject matter of such contract becomes illegal, and the prohibition acting directly upon it forbids its performance, and releases the parties from all obligations under it. But an *embargo* in its very nature and design, only imposes a temporary restraint, and while it suspends intercourse with foreign countries, it does not declare, nor does it mean to declare, that that intercourse is in itself unlawful. *Ibid.*

216. In this case the Court declared its dissent from the doctrine laid down by Lord Alvanley, (3 *Bozanquet and Pull.* 291,) which identifies the individual with the government, in order to bring him within the operation of the rule that whosoever by his own conduct prevents the fulfilment of a contract, shall not take advantage of a non-performance on the other side. *Ibid.*

217. Such a policy would be void if it were made pending the existence of the embargo, and

understanding that the vessel would sail in defiance thereof. *Odlin v. The Pennsylvania Ins. Co.*, 2 Wash. C. C. Rep. 300.

218. A vessel was insured *at and from New-York to any port or ports on the north side of Jamaica, and at and from either or all of said ports back to New-York*. She sailed on her voyage and arrived at Falmouth on the north side of Jamaica, where part of her cargo was delivered, and the proceeds thereof were taken on board in *rum*, and she sailed thence for *Montego Bay*. On her way thither she was captured by a Spanish privateer, and was subsequently re-captured by a British sloop of war and carried back again to Falmouth. The captain became apprehensive that proceedings might be instituted against her for carrying prohibited goods, and informed his owner how she was situated. On the 27th of November the owner offered to abandon to the underwriters, but they refused to accept the offer. The vessel and her cargo having been libelled for salvage, and a decree of *one eighth* having been made for the re-captors, they were sold on the 30th of December, and purchased in at the instance of the captain for £1000, and for the benefit of whomsoever it might concern. The lading of the vessel was completed at Montego Bay, and she arrived safe at New-York under a *bottomry bond* to the purchaser for £1000, which was the balance of his advances. The whole expense to which

the vessel and cargo were subjected on account of the capture and re-capture together with the salvage, amounted to about \$2,364. The freight which was received at Montego Bay amounted to about £806 *Jamaica* currency. The claim was for a total loss; *It was held*, that the plaintiff was not entitled to recover. The court observed that the vessel was libelled for salvage only, and one eighth was decreed; that the outward freight which was received by the captain exceeded the amount of the capture and re-capture and the salvage; that the vessel herself received no injury, and the effect of the re-capture was but a temporary obstruction of the voyage, which it was at all times in the captain's power to remove by applying for a commission of appraisement instead of a sale, which last course was preferred with a view to the interest of his owners, which was thereby promoted, and that she was purchased for the insured to promote their interest, with funds borrowed on the bottomry rather than by a sale of the cargo. *Queen et al. v. The Union Ins. Co.*, 2 *Wash. C. C. Rep.* 331. 2 *Condy's Marsh. on Ins.*, 582<sup>b</sup>, note.

219. Where a vessel sails on the voyage insured, and sustains damage from a storm to an amount exceeding half her value, *unless* on an application being made to him, the underwriter has offered to pay the amount of repairs at all events, the insured may recover as for a total loss. *Hart v. The*

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*Delaware Ins. Co., 2 Wash. C. C. Rep. 346. 1  
Condyl's Marsh. on Ins., 281<sup>a</sup>, note.*

220. The underwriter is not bound *in any case* to make or direct the repairs, but if the injury sustained is such that the insured may turn it into a total loss, and if the underwriter prefers to prosecute the voyage, he must engage to pay whatever may be necessary to fit her for that purpose, even although the amount should exceed what he might otherwise be liable for. *Ibid.*

221. The policy on *freight* does not generally attach until the cargo is put on board so as to produce an inception of the right to freight. *Ibid.*

222. But where a policy was on *freight at and from New-York to Wilmington, North Carolina, and at and from thence to Barbadoes, &c. &c.*, and it was stated at the foot of the policy, that the vessel was insured in and out of port during the whole voyage. She sailed from New-York, and was so damaged on her voyage to Wilmington by a storm, that she was unable to proceed. The insured had purchased a cargo to be taken on board at Wilmington, which was within the knowledge and understanding of the parties to the policy; *It was held*, that as regarded the *freight* the risk commenced with the voyage; that is, the insured engaged, in this case, that *the profit expected to be made by the freight of the vessel should not be prevented by any of the perils insured against.* *Ibid.*

223. Where the *freight, vessel, cargo, and addi-*

tional cargo are all insured by the same underwriters by separate policies, and there is a concealment of a circumstance relating to one of the subjects insured which materially enhances the risk, all the policies will be voided. *Marshall v. The Union Ins. Co.*, 2 Wash. C. C. Rep. 41, 45, 357. 1 *Condy's Marsh. on Ins.*, 473<sup>b</sup>, note.

224. Where, according to the established and generally known adjudications of the *belligerent courts*, certain circumstances become grounds for condemnation, though the same is contrary to the laws of nations, those circumstances ought to be disclosed by the insured, if they are known to him. *Ibid.*

225. The underwriter, in calculating the risk, takes into consideration not only that of condemnation, but also the hazard of capture and detention, and a concealment of such circumstances as may produce the latter must be material to the risk, inasmuch as they would, if known, increase the premium required. *Ibid.*

226. If a vessel, without having been exposed to any extraordinary peril of the sea, becomes unfit to prosecute her voyage after it has been commenced, it will raise so strong a presumption of want of sea-worthiness at the time of her departure, as to require strong evidence to repel such presumption, *Coit v. The Delaware Insurance Co.*, 2 Wash. C. C. Rep. 375. 1 *Condy's Marsh. on Ins.*, 159<sup>a</sup>, note.

227. It is the duty of the master to repair a ves-

sel where she has been injured by tempests, if it is possible to do so ; if she is not worth repairing it is his duty to have her regularly condemned. And unless it is proved that it was impossible to have her repaired, or that she was not worth repairing, the insured will not be sustained in undertaking to justify a breaking up of the voyage and converting a partial into a total loss. *Coit v. The Delaware Ins. Co.*, 2 Wash. C. C. Rep. 375.

228. Where the owners of property which is insured as neutral, are resident and carrying on trade in a belligerent country, the fact is material, and if the same is not disclosed to the underwriters the concealment will render the policy void. *Boduy v. The Union Ins. Co.*, 2 Wash. C. C. Rep. 391. 1 *Condy's Marsh. on Ins.*, 473<sup>c</sup>, note.

229. A bill of lading is such evidence of interest as that the insured may recover upon it. *Talcot v. The Union Ins. Co.*, 2 Wash. C. C. Rep. 449. *See post*, 312.

230. It is the master's duty, when his vessel is captured and carried in, to put in a claim, and his failing to do so may in some cases affect the interests of the insured. But the objection is removed where he has been deprived of necessary papers by the captors, and dies before he has had an opportunity to take the proper steps. *Marshall v. The Union Ins. Co.*, 2 Wash. C. C. Rep. 357, 411, 452.

231. In an *open policy*, in case of a total loss,

the value of the goods insured is to be fixed by the *current market price* at the time and place of shipping, and not by the invoice price or prime cost. *Carson v. The Marine Ins. Co.*, 2 Wash. C. C. Rep. 468.

232. Where the insured reasonably accounts for the injury sustained, by showing that severe gales were encountered during the voyage, and particularly when the sea-worthiness of the vessel on the preceding voyage is established, the burden of proof to make out the defence of unseaworthiness lies on the insurer, but it is otherwise where a disability happens without any adequate cause being assigned. *Watson v. The Ins. Co. of North America*, 2 Wash. C. C. Rep. 152, 480.

233. Where a *bottomry bond* has been executed abroad by the master, a few days before the date of the policy and without the knowledge of the insured, the amount thereof is to be deducted from the actual value of the property covered, and not from its value as estimated in the policy. *Ibid.*

234. Generally a *valued policy* is conclusive not only as to the value of the property at risk, but also of the interest which that valuation is sufficient to cover. The owner is at liberty to insure different portions of his entire interest with different underwriters, or to stand himself insurer for what he has not covered. *Ibid.*

235. Inasmuch as the value agreed upon is intended to fix a standard by which to ascertain the measure of the promised indemnity, it of course ceases to be obligatory if from any circumstances it fails to afford such standard, as where the loss is partial, or by fraud or accident the property has been greatly overrated. *Watson v. The Ins. Co. of North America, 2 Wash. C. C. Rep.* 152.

236. The meaning of a *warranty of neutrality* is, that the property insured is in fact neutral, and that it shall be so in appearance and conduct ; i. e. that the property belongs to neutrals, that it shall be so documented as to prove its neutrality if the same is questioned, and that no act shall be done, either by the insured or his agents, which can legally compromise its neutrality. *Schwartz v. The Ins. Co. of North America, 3 Wash. C. C. Rep.* 170.

237. And the warranty is not complied with if for want of such papers as are required by the law of nations, or treaties, or if by un-neutral conduct a loss ensues, or even an impediment occurs which varies or increases the risk although a loss is not the consequence. *Ibid.*

238. The neutrality is not forfeited by simply having on board *belligerent property*, for the law of nations does not prohibit a neutral from carrying belligerent property, and she is even entitled to *freight* on condemnation of the goods. But if the neutral endeavors by false appearances to cover the property of a belligerent, the increase of risk

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by being carried in for adjudication, is produced by fraud and not by a legal act, and the warranty is therefore broken. *Schwartz v. The Ins. Co. of North America*, 3 Wash. C. C. Rep. 170.

.239. Where the order which directed the insurance to be made contained the expression that the vessel was *out rather long, though not uncommon at this season*, the concealment of it was held not to be material, inasmuch as the insured was not acquainted with any facts which were not equally within the knowledge of the underwriter. *Kleine v. The Lancaster Ins. Co., C. C. U. S. P.*, October, 1811.

240. Where goods are insured and *warranted free from any loss which may arise in consequence of seizure or detention, for or on account of illicit or prohibited trade*, it is immaterial whether the insured knows that the trade is prohibited or not. *Smith v. The Delaware Ins. Co.*, 3 Wash. C. C. Rep. 127.

241. Such a warranty amounts to *a stipulation* that the trade in which the insured engages shall be lawful for the purposes of protecting the property insured, and that it shall not only be so in fact, but that it shall not become otherwise by any misconduct of the insured, or for the want of whatever documents are necessary and required by the laws and regulations of the country to render it legitimate. *Ibid.*

242. And if a seizure is made on account of any illicit or prohibited trade, although the vessel

has not broken bulk, or done any act which amounted to actual trading, the warranty is broken. *Smith v. The Delaware Ins. Co.*, 3 Wash. C. C. Rep. 127.

243. If a foreign merchant, who is in the habit of insuring for his correspondent, is directed to effect an insurance and neglects to do so, or does it in a different manner from the directions contained in the order, or does it insufficiently, he is answerable not only for damages, but as if he were himself the insurer, and he is of course entitled to the premium. *De Tastett v. Crousillat*, 2 Wash. C. C. Rep. 130. *See ante*, 188.

244. And if an agent is not able to comply with the orders, he will be liable to his correspondent in damages if he does not inform him of the circumstances. *Ibid.*

245. But the testimony of a person offered to prove that by letters received from his correspondent at the same place, insurances had been effected in cases of the same description at the time, is not admissible as evidence to show that the agent might have complied with the orders which he received. *Ibid.*

246. A vessel having been examined by surveyors they report that many of her timbers are unsound and rotten, and that in her shattered and strained condition, and the absence of proper docks for repairing her, the repairs would cost more than she was worth, and therefore a sale is recommended; *It was held*, that this was not a condemnation for

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*unsoundness or rottenness* within the clause in the policy which declares that in case the vessel should be condemned *as unsound or rotten* the underwriters should not be liable. *Watson v. The Ins. Co. of North America*, 3 Wash. C. C. Rep. 1.

247. Where a policy was *on goods or specie, both or either, from New-York to Baracoa, Nettias, and Matanzas in Cuba, and back*, and contained the usual clause as to prohibited trade, &c. The vessel put into Matanzas in distress on her return to New-York, and the specie was there seized; *It was held*, that as to the cargo generally, the insurers not knowing of what it consisted did not indemnify against losses from illicit trade, the terms of the policy excluding that, but as to the specie, as it was enumerated it was excepted from the clause of exemption; and the insurers were bound to know that by the general regulations of the *Spanish Colonies* the exportation of it was prohibited. *Seton v. The Delaware Ins. Co.*, 2 Wash. C. C. Rep. 175. 1 *Condy's Marsh. on Ins.*, 346\*, note.

248. A partial loss of an entire cargo by sea-damage, if it amounts to *more than one half*, may under certain circumstances be converted into a *technical total loss*; but not where a distinct part of the cargo is destroyed, and the voyage is not thereby broken up, or rendered not worth being prosecuted. *Ibid.* 2 *Condy's Marsh. on Ins.*, 562, note.

249. Where the written and printed clauses in

a policy are inconsistent and irreconcilable with each other, the former must control the latter; if however, they can both be made to stand together, and be available, such a construction of them should be adopted. *Seton v. The Delaware Ins. Co.*, 2 Wash. C. C. Rep. 175. See ante 194.

250. Insurance was effected in New-York on a ship for \$4000, valued at that sum; and an insurance was afterwards effected at Philadelphia, on the same ship and voyage for \$4000, valuing the ship at \$6000. Both policies contained the usual printed clause, that *if the assured shall have made any other insurance upon the premises prior in date, &c., the insurers shall be liable only for so much as the amount of such prior insurance may be deficient towards fully covering the premises, &c., and shall return the premium on so much of the sum by them insured, as they shall be by such prior insurance exonerated from.* A partial loss happened, which however was not covered by the amount for which the first underwriters were liable, and the insured brought an action against the second underwriters for the deficiency; *It was held*, that inasmuch as this policy had fixed the value at \$6000, the defendants were liable for the loss sustained, over and above the amount covered by the first policy, not to exceed however, the amount of \$2000 which was the balance of the valuation which was left uncovered by the first policy; that it was not necessary that the under-

writers should have had notice of the first policy ; and further, that the insured was entitled to a return of the premium upon the \$2000 insured above the value of the property. *Murray v. The Ins. Co. of Pennsylvania*, 2 Wash. C. C. Rep. 186. 1 *Condyl's Marsh. on Ins.*, 152\*, note.

251. Unless the question is put the insured is not bound to communicate to the underwriters where the vessel was built, or what is her age, it is sufficient if he is prepared to vindicate the implied warranty thereof when her sea-worthiness is questioned. *Poppleston v. Ketchum*, 3 Wash. C. C. Rep. 138.

252. In order to render a policy void, a misrepresentation must not only be in fact false, but it must likewise be material either in relation to the rate of the premium, or in holding out a false inducement to the underwriter to take the risk. A simple expression of an opinion as to the rate of premium which would be required in other places, cannot amount to such a misrepresentation. *Clason v. Smith*, 3 Wash. C. C. Rep. 156. *Cole v. The Marine Ins. Co.*, 3 Wash. C. C. Rep. 159.

253. The underwriter is not liable where the loss or injury sustained arises from the ordinary circumstances of the voyage, such as sea-damage, or wear and tear, without the action of any extraordinary cause. *Cole v. The Marine Ins. Co.*, 3 Wash. C. C. Rep. 159.

254. Where the termini of a voyage are fixed,

unless there is such a necessity for it as will excuse a deviation, a vessel cannot go out of the usual course of the voyage, even although she is permitted to stop and trade at any port or places. *Cole v. The Marine Ins. Co.*, 3 Wash. C. C. Rep. 159.

255. The insured is not entitled even to a return of premium where he has induced parties to take the risk by deception and false pretences, which, if known, would have prevented them from taking the risk, or would have altered the terms on which it was taken. *Schwartz v. The United States Ins. Co.*, 3 Wash. C. C. Rep. 170.

256. If the agent of the insured is guilty of fraud, and a knowledge of the circumstances which amounts to an adoption and sanction of his conduct, afterwards comes to his principal, the latter becomes involved in all the consequences as if he had originally participated in the same. *Ibid.*

257. A deviation is excusable where the policy is effected during peace, and hostilities intervene, and the vessel goes out of her ordinary track, and touches at a port not within the policy, if it is done with an honest intention to avoid the cruisers of the enemy. *Goyon v. Pleasants*, 3 Wash. C. C. Rep. 241.

258. In case of *memorandum articles* the insurer is bound to pay only where a *total loss* has occurred, the insured cannot claim indemnity against a *partial loss*. If the property reaches

its place of destination, though it may be reduced in quantity and deteriorated in quality to any degree, it is but a partial loss, and the insured cannot treat it as total. *Mareau v. The United Ins. Co.*, 3 Wash. C. C. Rep. 256.

259. There is no difference, however, between memorandum and other articles, where the question turns on totality of loss unconnected with the subject of loss by deterioration of the value of the cargo, or its reduction in quantity. If it is *in fact total*, or such a loss as the insured is permitted to treat as total, he may abandon and recover for a total loss in case of *memorandum* articles; but he will not be permitted to convert into a *total loss* that which is in fact and law a *partial loss*. *Ibid.*

260. As where an insurance was on *Indian corn*, and the vessel was wrecked near the port of her destination. The agent of the insured employed hands who saved nearly half the cargo; landed it, dried it, and sent it on to the port of destination. It was there sold for about *one fourth* of the price of sound corn, leaving a considerable balance after paying the expenses; *It was held* to be a *partial* and not a *total loss*, and that the underwriter was not liable. *Ibid.*

261. Where the trade in which the vessel is to be engaged during the voyage for which the insurance is effected, is contrary to the municipal law, or to the law of nations, a policy on the ship equal with the one upon the cargo, the particular

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subject of interdiction, is void. *Gray v. Sims*, 3 *Wash. C. C. Rep.* 276.

262. If in making the contract the parties anticipate the probability of the trade being interdicted, and, by its terms, the stipulation in the policy is, to protect it after it shall become illegal, it is immaterial whether such trade was or was not actually prohibited at the date of the policy. *Ibid.*

263. It is the duty of the insured to abandon within a reasonable time after notice of the loss. *Duncan v. Koch, Wallace*, 33. *See ante*, 179.

264. But he cannot be required to make his election until he has received certain information of the loss. *Ibid.* *See ante*, 180.

265. It is not necessary in a *valued policy* that the plaintiff should produce the original invoice, or show the prime cost of the goods damaged, to entitle him to recover in an action for an *average loss*. *Bentaloe v. Pratt, Wallace*, 58.

266. If it is within the course of the trade to touch and stop at a port which is out of the course of the voyage, it is not a deviation which will affect the policy; but whether such is the established usage or not is matter of fact, and the insured cannot recover if it is proved that the deviation was not for the objects and purposes authorized by such usage. *Ibid.*

267. It is not essential that a survey should be made at the port of delivery before breaking bulk in order to entitle the plaintiff to recover for an

*average loss* on a valued policy, on account of sea-damage to the goods insured. *Bentaloe v. Pratt, Wallace*, 58.

268. Liberty to *touch at* a place will not justify trading there, which would be accounted a deviation, and would avoid the policy. *The United States v. Shearman*, 1 Peters' C. C. Rep. 98.

269. Every warranty in a policy of insurance constitutes a condition precedent, whether it is express or implied, and the insured must aver and prove performance of such stipulation before he can entitle himself to recover from the underwriters. *Craig v. The United States Ins. Co.*, 1 Peters. C. C. Rep. 410.

270. A contract of insurance made upon a voyage which is opposed to either the common, statute, or maritime laws of the country where it is effected, is void, the courts of that country will not assist either party to enforce it, or to recover damages for the breach of it. *Ibid.*

271. A *deviation* is not merely going out of the track or usual course of the voyage, but it is also a departure from the express or implied terms of the contract. *Warder v. Goods, Admiralty Decisions*, 31.

272. All excuses for leaving the ordinary course, or for delay, must originate in necessity. *Ibid.*

273. A delay made for the purpose of saving goods, ships, or mariners, will not excuse a deviation. *Ibid.*

274. Seamen cannot insure their wages. *Mac Quirk v. The Penelope*, 2 *Adm. Decis.* 276.

275. Ship's papers, bills of lading, and other papers found on board, are *prima facie* evidence of the facts they speak, and such evidence as the law of nations admits in questions of prize vessels, and cargoes are generally acquitted or condemned on this evidence, and if it affirms the property to be such as is not prize, there must be an acquittal, if the captors do not show by contrary evidence which shall repel the presumption, that there were just grounds for the condemnation. If the paper affirms the property to belong to the enemy, and the captured does not produce clear and unquestionable evidence to the contrary, there must be a condemnation. *Milleck v. The Resolution*, 2 *Dallas*, 1, 22.

276. Where the evidence of a fact is equally within the power of both parties, it is incumbent on the captors to produce it. *Ibid.*

278. The record of a court of admiralty is evidence to prove the fact and the cause of condemnation. If it is read on the trial without objection, it is evidence of facts, so far as it exhibits documents which would be evidence in the cause if the originals were produced. *Russel v. The Union Ins. Co.*, 4 *Dallas*, 421. 1 *Condy's Marsh. on Ins.* 105, 159, and 465<sup>a</sup>, note 70. 2 *Condy's Marsh. on Ins.*, 706, note 118.

279. Presumptive evidence has the force of evi-

dence only while it remains uncontradicted. *Miller v. The Resolution*, 2 *Dallas*, 1, 22.

280. A foreign sentence of condemnation as good prize, is not conclusive evidence that the legal title to the property was not in a subject of a neutral nation. *Maley v. Shattock*, 3 *Cranch*, 458.

281. It is only evidence of its own correctness, and cannot be admitted to establish any particular fact without which the sentence may have been rightfully pronounced. *Ibid.*

282. In an action on a policy the sentence of a foreign court of admiralty, condemning a vessel for a breach of blockade, is conclusive evidence of that fact. *Croudson v. Leonard*, 4 *Cranch*, 434. 1 *Condy's Marsh. on Ins.*, 435, note.

283. Where copies of the proceedings of a foreign prize court are certified under the seal of the court by the deputy register, whose official character is certified by the judge of the court, and that of the judge by a notary public, they are admissible in evidence, inasmuch as, being a court of the law of nations, this is the proper mode of authenticating its proceedings. *Yeaton v. Fry*, 5 *Cranch*, 335.

284. The libel and sentence are all that it is necessary to produce in order to prove the condemnation of a vessel, in an action on the policy. *The Marine Ins. Co. of Alexandria v. Hodgson*, 6 *Cranch*, 206.

285. The proceedings at length need not be

read, as the depositions set forth in them are not evidence. *The Marine Ins. Co. of Alexandria v. Hodgson*, 6 *Cranch*, 206.

286. In an action on a *valued policy*, the underwriters will not be permitted to give parol evidence that the value of the subject insured is different from that which is stated in the policy. *Ibid.*

287. A bill of lading which states the property to belong to *A.* and *B.* is not conclusive so as to estop *A.* from showing it to be in another. *The Maryland Ins. Co. v. Ruden's Administrators*, 6 *Cranch*, 228.

288. A general usage and course of trade may be given in evidence, although the same may be founded upon the laws or edicts of the government of the country where it is supposed to prevail; and such usage may be proved by parol, and its effect will be the same whether it originated in an edict, or from instructions given to its officers by the government. *Livingston v. The Maryland Ins. Co.*, 7 *Cranch*, 506, 508.

289. The answer of one of several defendants to a bill in Chancery cannot be produced as evidence against a co-defendant, nor is the answer of an agent evidence against his principal, nor are his admissions *in pais* unless they are a part of the *res gestae*. *Leeds v. The Marine Ins. Co. of Alexandria*, 2 *Wheaton*, 380.

290. The same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged state, is also admissible

to prove that they are in the service of a newly created government. Its seal cannot be admitted to prove itself, but may be proved by such testimony as the nature of the case admits ; and if it is impracticable to prove the seal, the fact of their being in the service of such government may be otherwise established. *The United States v. Palmer*, 3 *Wheaton*, 610. *The Estrella*, 4 *Wheaton*, 298.

291. A privateer cruising under a commission from a newly established government, was lost after making a capture, and parol proof was admitted to show the previous existence of the commission on board of the vessel. *The Estrella*, 4 *Wheaton*, 298.

292. The *commission* of a public ship of a foreign state, which is required by the proper authorities, is conclusive evidence of her national character. *The Sanctissima Trinidad*, 7 *Wheaton*, 283.

293. An exemplification of the condemnation of a vessel in a foreign court of vice-admiralty, reciting the certificate of the surveyors that the vessel was unworthy to be repaired, and unsafe and unfit ever to go to sea again, and produced in evidence to prove the loss, is a *regular survey*. *Dorr v. The Pacific Ins. Co.*, 7 *Wheaton*, 581.

294. Proof that a subscribing witness had entered on board of a privateer, and had not been heard of for four years, after diligent inquiry, is

sufficient to let in proof of his handwriting. *Spring v. The South Carolina Ins. Co.*, 8 Wheaton, 268.

295. In case of the loss of a ship, her *original register* is required by law to be transmitted to the registry of the treasury to be cancelled, and it is the practice not to destroy the register after it is cancelled. It is a document required by law to be deposited in the Register's office, and a certified copy thereof is admissible in evidence. *Catlett v. The Pacific Ins. Co.*, 1 Paine, 594.

296. The record of the condemnation of a vessel in a court of vice-admiralty is not evidence *per se*. The seal does not prove itself, but must be proved by a witness who knows it; or the handwriting of the judge or clerk must be proved; or that it is an examined copy. The certificate of the American Consul is not sufficient to authenticate it. *Ibid.*

297. The testimony of the captain that a survey was held on the vessel, and that it was reported by the surveyors that she could not be repaired but at too great an expense, and that on his application thereupon she was condemned, although not evidence of these proceedings, was *held* to be evidence that he coincided in opinion with the surveyors. *Ibid.*

298. An averment of an entire interest in the plaintiff, in the thing insured, is not supported by proof of a joint interest with others. *Ibid.*

299. Nor is an averment of a joint interest with others sustained by proof of a sole interest. *Catlett v. The Pacific Ins. Co.*, 1 *Paine*, 594.

300. The protest of a sailor, which was not made at the first port after the loss, but after his return to the home port, and which was presented to the underwriter, may be read in evidence to show a compliance with the clause in the policy which provides that payment shall be made *within thirty days after proof of loss*; but it is not evidence before a jury to prove the fact of a loss. *Ruan v. Gardner*, 1 *Wash. C. C. Rep.* 145. 2 *Condy's Marsh. on Ins.* 716<sup>a</sup> and 733 *note*.

301. In an action on a policy of insurance, the protest of the captain is not admissible in evidence for either party. *Scriba v. The Ins. Co. of North America*, 2 *Wash. C. C. Rep.* 107. 2 *Condy's Marsh. on Ins.*, 716<sup>a</sup>, *note*.

302. It may, however, be read to contradict what the captain may have stated in his examination in the cause, in order to discredit him. *Lamalore v. Gaze*, 1 *Wash. C. C. Rep.* 413. 2 *Condy's Marsh. on Ins.*, 715, *note*.

303. Where an action is grounded on the incapacity of a vessel to prosecute her voyage on account of damage which she has sustained from stress of weather, the warrant of survey and the report are a judicial proceeding, and in writing, and parol evidence is inadmissible to prove their contents, though the facts contained therein may be

proved by other evidence than the report. *Robinson v. Clifford*, 2 Wash. C. C. Rep. 1. 1 *Condy's Marsh. on Ins.*, 159<sup>a</sup>.

304. A certificate from the register of the vice-admiralty court, where the proceedings took place, that the warrant was lost, is not evidence; it must be established under a commission in the usual manner of proving facts. *Ibid.*

305. Where it is evident that the foreign law which is attempted to be proved is a written statute or edict, it can be proved only by the production of the law itself; the unwritten law may be proved by witnesses. *Ibid.* 2 *Condy's Marsh. on Ins.*, 706<sup>a</sup>, note.

306. Depositions from the record of trial before the admiralty court may be read to show what was the ground of condemnation. *Dederer v. The Delaware Ins. Co.*, 2 Wash. C. C. Rep. 61. 2 *Condy's Marsh. on Ins.*, 706, note.

307. An invoice which carries with it proof of fairness is uniformly admitted in evidence, and is *prima facie* proof of value, although according to the general rules of law it would be inadmissible. *Graham v. The Pennsylvania Ins. Co.*, 2 Wash. C. C. Rep. 113. 2 *Condy's Marsh. on Ins.*, 709<sup>a</sup>, note.

308. Generally in such case, the circumstance that a bill of lading is dated after the capture took place, would create a suspicion of fraud, yet it admits of explanation, and if it is shown that the

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capture took place while the vessel was taking in her load the suspicion is removed. *Graham v. The Pennsylvania Ins. Co.*, 2 Wash. C. C. Rep. 113.

309. A survey ordered by an American consul in a foreign port, into which the vessel insured put for repairs, and a report of surveyors thereon is not admissible in evidence, it not being a judicial act, the facts must still be proved as in ordinary cases. It might have been otherwise had it appeared that there were no tribunals at the place from which a regular order of survey and condemnation could have been obtained. *Coit et al. v. The Delaware Ins. Co.*, 2 Wash. C. C. Rep. 375. 1 *Condyl's Marsh. on Ins.*, 159<sup>a</sup>, note.

310. A paper which purports to be a record of the proceedings of a foreign court, cannot be read in evidence unless it has the sanction of the seal of the officer by whom it was made out, there being no proof that he had or had not a seal. *Talcott v. The Delaware Ins. Co.*, 2 Wash. C. C. Rep. 449.

311. A paper which is certified by a notary to be a true copy is inadmissible unless it appears that he had charge of the original, and has authority to authenticate transcripts. *Ibid.*

312. A bill of lading is such evidence of interest that the insured may recover upon it. *Ibid.* See *ante*, 229.

313. If the sentence of a foreign court is free

from ambiguity, and requires no aid from any other part of the record to explain the ground upon which it proceeded, no other part of the record can be read. *Marshall v. The Union Ins. Co.*, 2 Wash. C. C. Rep. 357.

314. Yet there are certain purposes for which the record may be referred to, *as*, to show that no claim was put in; *that* the condemnation was probably produced by an untrue and fraudulent claim, or by other misconduct of the master, to be collected from his answers to the standing interrogatories, and from the same source to impeach his evidence given at the trial; and to show what papers were found on board and acknowledged by the master. *Ibid.*

315. A certificate of the survey of a vessel is not evidence of facts which are stated in it, but if the surveyors in a deposition regularly taken, refer to a certificate as containing what they know upon the subject, it is evidence. *The United States v. Mitchell*, 2 Wash. C. C. Rep. 478.

316. The certificate of an American Consul at a foreign port, under his seal of office, which states that the ship's papers were lodged with him agreeably with the requisitions of the embargo law, is good evidence of that fact, but not of other facts contained in the certificate. *Ibid.*

317. If a *log-book* is offered in evidence, it must be proved to be the book kept during the voyage, it is not sufficient to prove the mate's handwriting as to *some* of the entries. *The*

*United States v. Mitchell, 2 Wash. C. C. Rep. 478.*

318. If the certificate of surveyors of a vessel is offered in evidence merely for the purpose of showing that a survey and condemnation had taken place, but not with a view to prove any fact which is stated in it, the party giving it in evidence will not be precluded from impeaching the credit of the surveyors, whose depositions have been read. *Watson v. The Ins. Co. of North America, 2 Wash. C. C. Rep. 480.*

319. The rule which prevents a witness from impeaching a paper to which he has given credit, extends only to negotiable instruments, and can apply only where the paper has been negotiated; while the dispute is between the original parties there is no difference between such an instrument and one not negotiable. *Blagg v. The Phænix Ins. Co., 3 Wash. C. C. Rep. 5.*

320. In an action upon the policy the plaintiff must show an inception of the voyage insured, that he had an interest on board, and the amount of that interest. The bill of lading and invoices are the ordinary evidences of interest, but they may be contradicted, as well as regards their genuineness and authenticity, as their truth. *Ibid.*

321. The report of surveyors appointed in a foreign country to examine a vessel, is only evidence that a survey was ordered and made, but not of the facts stated in it. *Watson v. The Ins. Co. of North America, 3 Wash. C. C. Rep. 1.*

322. Where the sentence of a foreign court of admiralty is full, and shows clearly the grounds of condemnation, no other part of the record can be produced. *Hourquebies v. Gerard*, 2 Wash. C. C. Rep. 164, 212.

323. Though the usual evidence of property in a vessel is the registry and bill of sale, if there are such papers; and in the cargo, the invoice, bill of lading, bills of sale, &c.; yet other evidence may be admitted. *United States v. Jones*, 3 Wash. C. C. Rep. 209.

324. A copy of the policy, which is proved to have been compared with the original register on the books of the insurance company, cannot be read in evidence upon failure to produce the original on notice. The register in the hands of the company should be produced, after laying the preliminary ground. *The United States v. Shearman*, 1 Peters' C. C. Rep. 98.

325. To affirm that in policies of insurances executed *for account of whom it may concern*, there can be no undue concealment as to the parties interested in the property to be insured, is obviously going much too far, since the underwriter has an unquestionable right to be informed if he makes inquiry. The insured may be silent, it is true, if he will, and let the premium be charged accordingly, but if the inquiry then made, should be responded to with information contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy, which

may differ materially from the known and received signification in ordinary cases. He, for instance, who insures *for whom it may concern*, under an express assurance that there is no belligerent interest in the cargo, could not, upon any principle, be held to have made an insurance on *belligerent interest*. *Buck and Hendrick v. The Chesapeake Ins. Co.*, 1 Peters' Rep. 159.

326. It is a general principle that a policy of insurance is a contract of good faith, and it is void whenever any imposition is practiced. *Ibid.*

327. A policy *for whom it may concern* will, in ordinary cases, cover belligerent property. *Ibid.*

328. A representation made previous to the execution of the policy will be sunk or absorbed, or put out of the contract, where the policy is executed in obvious inconsistency with such representation. *Ibid.*

329. A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce, of the course and incidents of the trade on which they insure, and the established import of the terms used in their contract must necessarily be imputed to underwriters. *Ibid.*

330. The term *interest*, as used in application to the right to insure, does not necessarily imply *property* in the subject of the insurance. *Ibid.*

331. The master of a vessel, to whom property shipped on board of his vessel is to be consigned, in the absence of proof that the owner of the pro-

party had not given authority to order an insurance, has an *insurable interest* in the property on board of his vessel, and this interest is sufficient to authorize the recovery of a loss under the policy. *Buck and Hendrick v. The Chesapeake Ins. Co.*, 1 Peters' Rep. 159.

332. In an action upon a policy *for whom it may concern*, the plaintiffs are not bound to prove that at the time of effecting the insurance, or at any other time, they disclosed to the defendants that *Spanish* property was intended to be covered thereby, unless inquiries on the subject were made by the underwriter before subscribing the insurance. *Ibid*, 164.

333. Every ship must possess all the qualities of seaworthiness at the commencement of the voyage insured, and be navigated by a competent master and crew. *M' Lanahan v. The Universal Ins. Co.*, 1 Peters' Rep. 183.

334. Seaworthiness in port or for temporary purposes, such as a mere change of position in the harbor, or proceeding out of port, or lying in the offing, may be one thing, and seaworthiness for the whole voyage quite another. *Ibid*, 184.

335. A policy on a ship *at and from a port* will attach, although she is undergoing extensive repairs at the time, in port, so as in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy. *Ibid*.

336. What is a competent crew for the voyage, at what time such crew should be on board, what

is proper pilot ground, what is the course and usage of trade in relation to the master and crew being on board when the ship breaks ground for the voyage, are questions of fact dependant on nautical testimony, and are incapable of being solved by a court without taking to itself the province of a jury, and judicially relying on its own skill in nautical affairs. *M' Lanahan v. The Universal Ins. Co.*, 1 Peters' Rep. 183.

337. The contract of insurance is one of mutual good faith, *uberrimæ fidei*, governed by principles of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring the insurance, is not at the time in the possession of any facts material to the risk which he does not disclose, and that no known loss has occurred which by reasonable diligence might have been communicated to him. *Ibid*, 185.

338. Where a party orders an insurance and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, as soon as with reasonable and due diligence it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits to do so, when by the exercise of due and reasonable diligence the information might have been communicated in time to have countermanded the insurance, the policy will be void. The party's own knowledge in such a case, affects the act of his

agent in the same manner and to the same extent as the knowledge of the agent himself would do. *Mc Lanahan v. The Universal Ins. Co.*, 1 Peters' Rep. 135.

339. What constitutes due and reasonable diligence is a question of fact for the jury. *Ibid.*

340. The time of sailing is often but not always material to the risk, and unless it is so, an accidental concealment of it will not prejudice the policy. It is well settled that to render a concealment fatal to the policy of insurance it must be material to the risk ; and its materiality is a question for the jury. *Ibid.* 188.

341. The law gives to the act of abandonment to underwriters, when it is accepted, all the effects which the most accurately drawn instrument would accomplish. The underwriter then stands in the place of the insured, and becomes legally entitled to all that may be recovered from destruction. *Comegy and others v. Vasse*, 1 Peters' Rep. 213.

342. The right to compensation for damages and injuries to which citizens of the United States were entitled, and which under the treaty with Spain were to be the subject of compensation, passed by abandonment to the underwriters upon property which had been seized or captured. *Ibid.* 215.

343. And such right may be further assigned by the persons to whom it has been thus ceded. *Ibid.*

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344. Bills of lading are transferable by endorsement, and may thus pass the interest and title in the property. *Conard v. The Atlantic Ins. Co.*, 1 *Peters' Rep.* 445.

345. But, strictly speaking, no person but the consignee can pass the legal title to the goods by an endorsement on the bill of lading. *Ibid.*

346. It is not necessary that a *respondentia* loan should be made before the departure of the ship on the voyage; or that the money loaned should be employed in the outfit of the vessel; or invested in the goods on which the risk is run. It is immaterial at what time the loan is made, or upon what goods the risk is taken. If it is really and substantially taken, if the transaction is not a device to cover usury, gaming, or fraud; if the advance is made in good faith for a maritime premium, it is no objection to it that it was made after the voyage was commenced, or that the money was appropriated to purposes wholly unconnected with the voyage. *Ibid.*

347. The lender is not presumed to lend upon the faith of any particular appropriation of the money, and were it otherwise, his security could not be avoided by any misapplication of the fund, where the risk was *bona fide* run upon other goods, and it was not a mere contract of wager and hazard. *Ibid.*

348. In all the treatises on insurance, and in all the cases in which the question has arisen, the principle is, that a misrepresentation which is ma-

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terial to the risk avoids the policy. *The Columbian Ins. Co. v. Lawrence*, 2 Peters' Rep. 51.

349. A policy of insurance was effected on a brig *Hope*, from *Alexandria to Barbadoes, and back to the United States*. On her outward voyage she put into Hampton Roads for shelter during an approaching storm, and was driven on shore above high water mark. A survey was held, and it was recommended that she should be sold for the benefit of all concerned. The insured abandoned, and there was no pretence but that the injury sustained justified the abandonment. The question was, whether by the acts of the insured the abandonment had not been waived or revoked. The court *held*, that there can be no doubt but that the revocation of an abandonment, before the same is accepted by the underwriters, may be inferred from the conduct of the insured, if his acts and interference with the use and management of the subject insured are such as satisfactorily to show that he intended to act as owner, and not for the benefit of the underwriters. But this is always a question of intention to be collected from the circumstances of the case, and belongs to the jury as a matter of fact, and is not to be decided by the court as matter of law. *The Columbian Ins. Co. v. Ashly and Stribling*, 4 Peters' Rep. 139.

350. In the case of the *Cheasapeake Ins. Co. v. Stark*, (6 Cranch, 272,) this court lays down the general rule, that if an abandonment is le-

gally made, it puts the underwriter completely in the place of the insured, and the agent of the latter becomes the agent of the former, so that the acts of the agent interfering with the subject insured, will not effect the abandonment. But the court takes a distinction between the acts of an agent and the acts of the insured. In the latter case, any acts of ownership by the owner himself, might be construed into a relinquishment of an abandonment which had not been accepted. The court in this case did not say, and we think did not mean to be understood as intimating, that every such act of ownership must necessarily, and under all possible circumstances, be construed into a relinquishment of an abandonment. The practical operation of so hard a rule would be extremely injurious. *The Columbian Ins. Co. v. Ashly and Stribling*, 4 Peters' Rep. 139, 144.

351. If a vessel is injured by any of the perils insured against, so as that she cannot be repaired at the port of necessity without an expenditure to an amount exceeding half the value of the vessel *at that port, after such repairs*, it constitutes a total loss. *The Patapsco Ins. Co. v. Southgate*, 5 Peters' Rep. 604.

352. The general rule laid down in the books, is, that the true basis of calculation is the value of the vessel at the time of the accident, and if so, it necessarily follows that this must be the value *at the place where the accident happens*. The sale

is not conclusive as to such value, and if any suspicion of fraud or misconduct rests upon the transaction, the question is open for other evidence. *The Patapsco Ins. Co. v. Southgate*, 5 Peters' Rep. 604.

353. There can be no doubt that the injury to a vessel may be so great as to justify a sale by the master. There must be in him this implied authority from the nature of the case, and from necessity he becomes the agent of both parties, and is bound to act in good faith for the benefit of all concerned, and the underwriter must answer for the consequences, because it is in his contract of indemnity. *Ibid.*

354. Yet there must be a necessity for such sale, and good faith on the part of the master in making it. That necessity is not inferrible, however, from the fact of a sale in good faith, but must be determined from the circumstances of the case. The professional skill, the due and proper diligence of the master, his opinion of the necessity, and the benefit which would result from the sale to all concerned would not justify it, unless the circumstances in which the vessel was placed, in the opinion of the jury, rendered the sale necessary. *Ibid.*

355. There is a diversity of opinion among elementary writers, and in the adjudged cases, as to what will constitute a valid abandonment. It seems agreed however, that no particular form is necessary, nor is it indispensable that it should be

in writing. But however it is made, it ought to be explicit, and not left open as matter of inference from some equivocal acts. The insured must yield up to the underwriter all his right, title, and interest in the subject insured ; for the abandonment when properly made operates as a transfer of the property to the underwriters, and gives them a title to the whole, or whatever remains of it, so far as it is covered by the policy. *Ibid.*

356. Where an insurance was upon *profits* on a voyage from *Philadelphia to Gibraltar, and a port in the Mediterranean not higher up than Marseilles, and at and from thence to Lousonate in the province of Guatamala, Pacific Ocean, with the liberty of Guayaquil*. The risks were those usually contained in policies, including fire and barratry. The loss alleged was from fire alone. The vessel reached Gibraltar in safety, and while lying there took fire, and together with her cargo, was entirely consumed. The cause was appealed to the Supreme Court by a writ of error to the Circuit Court of the District of Maryland, *because* 1, The Circuit Court refused to instruct the jury that if the fire proceeded from the carelessness or negligence of the captain the insured could not recover. 2, That if the fire originated from accident, or without any want of due care on the part of the master and crew, and the jury believed that by proper and reasonable exertions the vessel and cargo might have been preserved by them, which they omitted, the assured could not recover.

3. Because that court also refused to instruct the jury that the assured were not entitled to recover, they having offered no evidence to show that the sales of the cargo at Gibraltar would have yielded a profit; *It was held*, that there was no error in not giving these instructions, and that proof that profits would have arisen on the voyage is not required where the cargo has been lost, in order to recover on a policy on profits. *The Patapsco Ins. Co. v. John Coulter*, 3 Peters' Rep. 222.

357. The British courts have adopted the safe and legal rule in deciding that where the policy covers the risk of barratry, and fire is the proximate cause of the loss, they will not sustain the defence that negligence was the remote cause, but will hold the insurers liable for the loss. *Ibid.*

358. The rule that a loss which is the immediate consequence of a peril insured against, is a loss within the policy, although it may have been remotely caused by the negligence of the master and mariners, has been affirmed in several successive cases in the English courts. *Ibid.* 237.

359. Where a vessel was sold in consequence of her having sustained damages, the repairs of which, in the opinion of the master, would have cost more than half her value at the port of necessity, and the United States Consul at that port, declared, in the protest of the captain made at his request, that the captain abandoned the vessel to the underwriters, and this protest as soon as it was received by the insured, the owners of

the vessel, was sent to the underwriters ; and the owners wrote at the same time saying that they would forward a statement of the loss with the necessary vouchers, and soon thereafter did so ; *It was held*, that this constituted a valid abandonment. *The Patapsco Ins. Co. v. Southgate*, 5 *Peters' Rep.* 604.

360. *Freight, pro rata iteneris*, is not due unless the owner of the cargo voluntarily agreed to receive it at a place short of its ultimate destination ; when it is compulsory, by the supercargo acting for the benefit of the concerned, no freight is earned. *Caze v. The Baltimore Ins. Co.*, 7 *Cranch*, 318. *Hurtin v. The Union Ins. Co.*, 1 *Wash. C. C. Rep.* 530.

361. Where the general owner of a ship retains possession, command, and navigation of her, and contracts to carry a cargo on freight for the voyage, the charter-party is to be considered as a mere affreightment, sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. The general owner is the owner for the voyage. *Marcardier v. The Chesapeake Ins. Co.*, 8 *Cranch*, 39.

362. A bill of lading which states the property to belong to *A.* and *B.* is not conclusive evidence, and does not estop *A.* from showing it to belong to another. *The Maryland Ins. Co. v. Ruden's Administrators*, 6 *Cranch*, 228.

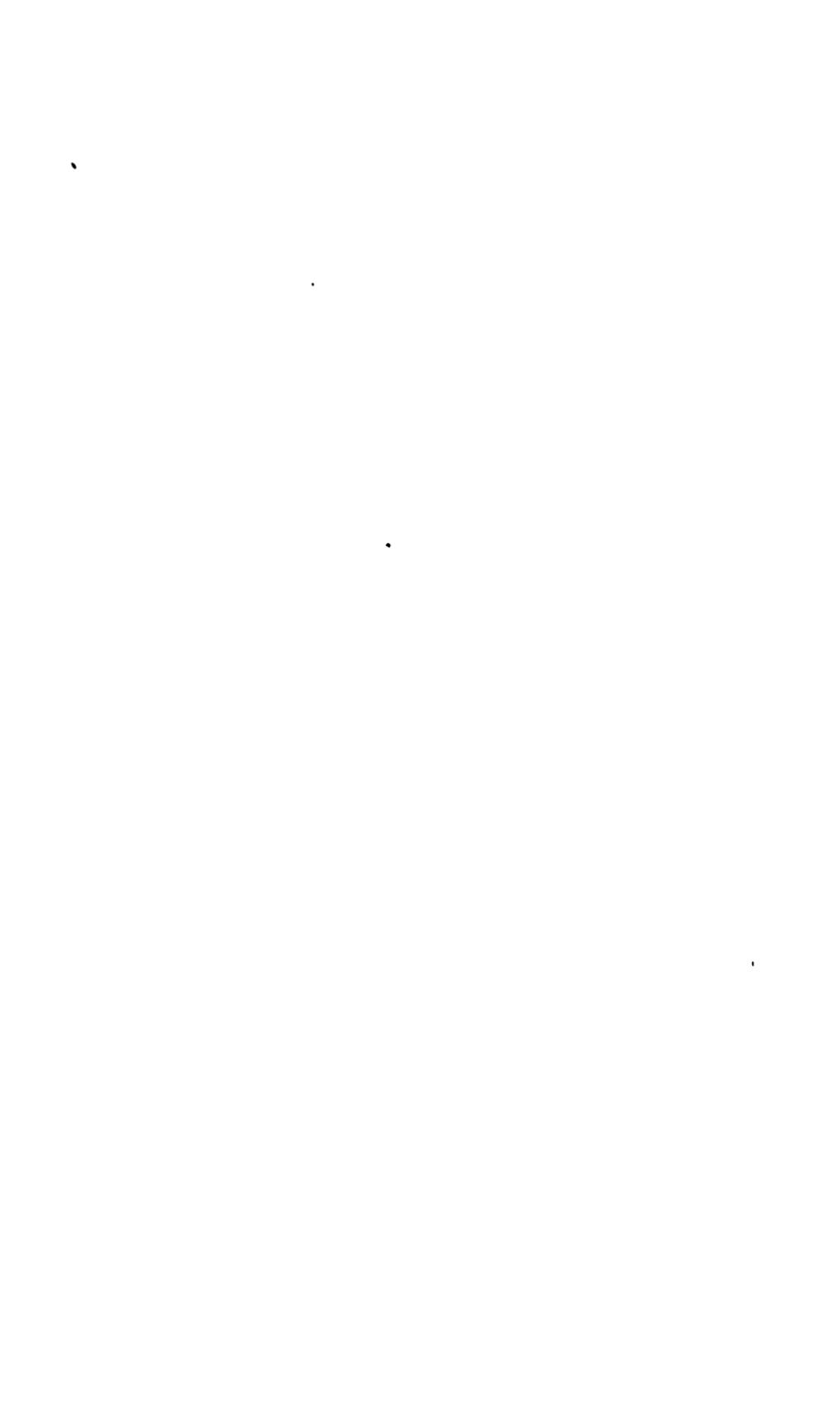
363. The treaty between the United States and Great Britain contains the clause, *and whereas it*

*frequently happens that vessels sail to a port or place belonging to an enemy without knowing that the same is either besieged, blockaded, or invested, it is agreed that any vessel so circumstanced may be turned away from such a place, but she shall not be detained, nor her cargo, if not contraband, confiscated; unless after notice she shall again attempt to enter; but she shall be permitted to go to any other place she may think proper.* This treaty is conceived to be a correct exposition of the law of nations. *Fitzsimmons v. The Newport Ins. Co.*, 4 *Cranch*, 185, 199.

364. Neither the law of nations, nor the treaty, admits of the condemnation of a neutral vessel for the *intention* to enter a blockaded port, unconnected with any facts. Under the treaty, a second attempt must be made to enter the invested place after notice of the blockade. Lingered about the place, as if watching for an opportunity to sail into it, or the single circumstance of not making immediately for another port, or possibly, obstinate and determined declarations of a resolution to break the blockade, might be evidence of an attempt to enter the blockaded port after warning. But whether these circumstances or others, may or may not amount to evidence of the offence, the offence itself is *the attempting again to enter*, and *unless after notice she shall again attempt to enter*, the two nations expressly stipulate that she shall not be detained, nor her cargo, (if it is not contraband,) confiscated. *Ibid.* 200, 201.

FINIS.









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